No. 15-9260
Title: Levon Dean, Jr., Petitioner
v.
United States
Docketed: May 11, 2016
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (15-1263)
Decision Date: December 29, 2015
Rehearing Denied: February 12, 2016
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 4 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 10, 2016)
Jun 1 2016	Order extending time to file response to petition to and including July 11, 2016.
Jun 24 2016	Order further extending time to file response to petition to and including August 10, 2016.
Aug 2 2016	Order further extending time to file response to petition to and including September 9, 2016.
Sep 9 2016	Brief of respondent United States in opposition filed.
Sep 29 2016	DISTRIBUTED for Conference of October 14, 2016.
Oct 24 2016	DISTRIBUTED for Conference of October 28, 2016.
Oct 26 2016	Reply of petitioner Levon Dean, Jr. filed. (Distributed)
Oct 28 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 2 presented by the petition.
Nov 14 2016	Motion to appoint counsel filed by petitioner Levon Dean, Jr.
Nov 21 2016	DISTRIBUTED for Conference of December 9, 2016.
Nov 21 2016	Motion DISTRIBUTED for Conference of December 9, 2016.
Dec 2 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 16, 2016.
Dec 2 2016	The time to file respondent's brief on the merits is extended to and including January 19, 2017.
Dec 12 2016	Motion to appoint counsel filed by petitioner GRANTED and Alan G. Stoler, Esquire, of Omaha, Nebraska, is appointed to serve as counsel for the petitioner in this case.
Dec 16 2016	Joint appendix filed. (Statement of costs filed)
Dec 16 2016	Brief of petitioner Levon Dean, Jr. filed.
Dec 20 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the petitioner.
Dec 22 2016	SET FOR ARGUMENT on Tuesday, February 28, 2017.
Dec 23 2016	Brief amici curiae of The National Association of Criminal Defense Lawyers, et al. filed.
Dec 30 2016	Record requested from U.S.C.A. 8th Circuit.
Jan 11 2017	Record received from U.S.C.A. 8th Circuit, 1 Box. Part of the record is SEALED.
Jan 18 2017	CIRCULATED.

Jan 19 2017	Brief of respondent United States (Corrected) filed. (Distributed)
Feb 15 2017	Reply of petitioner Levon Dean, Jr. filed. (Distributed)
Feb 28 2017	Argued. For petitioner: Alan G. Stoler, Omaha, Neb. (Appointed by this Court.) For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Apr 3 2017	Judgment REVERSED and case REMANDED. Roberts, C. J., delivered the opinion for a unanimous Court.
May 5 2017	JUDGMENT ISSUED.
Aug 11 2017	Record from the U.S.C.A. for the Eight Circuit has been returned.

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RECORD AND BRIEFS

No. 15 9260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

LEVON DEAN JR.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Levon Dena, Jr., pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39.1 of the United States Supreme Court, ask leave to file the attached Petition for Writ of Certiorari without prepayment of costs, and to proceed *in forma pauperis*. Petitioner's affidavit or declaration is not attached because the United States District Court for the Northern District of Iowa and the United States Court of Appeals for the Eighth Circuit appointed counsel pursuant to the Criminal Justice Act of 1964 at 18 U.S.C. § 3006A.

DATE: May 4, 2016

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15-9260

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

Supreme Court, U.S.
FILED

LEVON DEAN, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a defendant can be convicted of a Hobbs Act robbery pursuant to 18 U.S.C. § 1951 when the evidence submitted to the jury disclosed the victim was not involved in drug distribution effecting commerce during the time of the robbery nor was there any intent to rob a "drug dealer" by the defendant.

(2) Whether, *Pepper v. United States*, 562 U.S. 476, 131 s. Ct. 1229, 179 l. Ed. 2d 196 (2011) overruled *United States v. Hatcher*, 501 f.3d 931 (8th cir. 2007) and related opinions from the Eighth Circuit Court of Appeals to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence or sentences under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the 18 U.S.C. § 924(c) convictions.

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Reason for Granting the Writ

I. The United States Court of Appeals for the Eighth Circuit's decision is contrary to circuit courts of appeal cases deciding the application of the Hobbs Act to crimes involving robberies effecting commerce to the extent that the decision in this case allows a defendant can be convicted of a Hobbs Act robbery pursuant to 18 U.S.C. § 1951 when the evidence submitted to the jury disclosed the victim was not involved in drug distribution effecting commerce during the time of the robbery nor was there any intent to rob a "drug dealer" by the defendant. 6

II. The United States Court of Appeals for the Eighth Circuit's decision is contrary to this court's decision in *Pepper v. United States*, 562 u.s. 476, 131 s. Ct. 1229, 179 l. Ed. 2d 196 (2011) overruled *United States v. Hatcher*, 501 f.3d 931 (8th Cir. 2007) and related opinions from the Eighth Circuit to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence or sentences under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the

basis for the 18 U.S.C. § 924(c) convictions. This decision is in conflict with the Tenth Circuit Court of Appeals' decision in *United States v. Smith*, 756 F.3d 1179 (10th Cir. 2014).....8

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Decision of the United States Court of Appeals, *United States v. Dean*, 810 F.3d 521 (8th Cir. 2015).....A-1

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

LEVON DEAN, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A-1 to the petition and is reported at *United States v. Dean*, 810 F.3d 521 (8th Cir. 2015).

The Order denying Dean's petition for rehearing or rehearing *en banc* is included at Appendix A-2 to this petition and is not reported.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit deciding the case was entered on December 29, 2015 and appears at appendix A-1.

A timely petition for rehearing or rehearing *en banc* was filed on January 12, 2016. The order denying Petitioners' rehearing and rehearing *en banc* request was entered on February 12, 2016 and appears at Appendix A-2.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The Petition for Writ of Certiorari is due May 12, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1951 :

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining...

(3) The term "commerce" means commerce within the District of

Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C § 3553(a):

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable

category of defendant as set forth in the guidelines— ...

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense ...

18 U.S.C. § 3661:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

On April 16, 2014 a third superseding indictment was filed charging Levon Dean, Jr., his brother Jamal Dean and others in 11 counts. The counts relevant to the issues presented in this petition are as follows: 1 count of conspiracy to interfere with commerce through robbery; two counts of interference with commerce by robbery; 2 counts of carjacking; and 2 counts of possession of a firearm in furtherance of a crime of violence. Summarily, the government charged Levon Dean and his brother, Jamal Dean, with two Hobbs Act robberies of two different alleged drug dealers on two separate dates. Each time it was alleged that a firearm was possessed in furtherance of the robberies.

A jury trial was held and the jury returned verdicts of guilty of the conspiracy to commit a robbery interfering with commerce, aiding and abetting robbery interfering with commerce, robbery interfering with commerce, two counts of possessing a firearm in furtherance of a crime of violence, and being a prohibited person in possession of a firearm as to Levon Dean, Jr. He was found not guilty of two other counts alleging carjacking, and one count charging interstate transportation of a stolen motor vehicle. One count of interstate transportation of a stolen motor vehicle was dismissed prior to jury deliberations.

On January 28, 2015 Levon Dean, Jr. was sentenced to a total term of imprisonment of 400 months. On counts 1, 2, 3, and 9 the court imposed concurrent terms of 40 months, a consecutive term of 60 months on count 6 which was a 18 U.S.C. 924(c) violation and a consecutive term of 300 months on count 7 which was a

subsequent 924(c) violation. At sentencing, Dean requested a variance from the advisory guideline range on the convictions for the counts which carried no mandatory minimum or mandatory consecutive sentencing provisions. Those convictions were the underlying felonies used to support the 360 months of mandatory consecutive imprisonment required by the two convictions under 18 U.S.C. § 924(c).

The Honorable Mark Bennett of the United States District Court for the Northern District of Iowa stated he did not believe, due to Eighth Circuit precedent, he had the authority to grant the variance request. The judge stated however, if he did have the authority to do so he would have sentenced Dean to 360 months on the 18 U.S.C. 924(c) convictions as required by law and impose a sentence of 1 day on the remaining convictions.

Dean appealed his convictions and sentence claiming, as pertinenet to this petition, the alleged victim in the first robbery was not, in fact, engaged in the business of trafficking drugs and the evidence established that Levon Dean's intent on the night of the robbery was to act as an enforcer for a woman named Sara Berg who was owed money by J.R. for previous encounters for prostitution. Dean also appealed the district court's sentence claiming that *Pepper v. United States*, *Pepper v. United States*, 562 U.S. 476 (2011) overruled the Eight Circuit's precedent precluding a district court from considering the nature of the harsh mandatory sentences imposed pursuant to 18 U.S.C. § 924(c) in determining the proper sentence for the felony convictions which underlie the 924(c) sentences and urged the court of appeals to adopt the reasoning found in the Tenth Circuit Court of Appeals opinion in *United States v. Smith*, 756 F.3d

1179 (10th Cir. 2014). After review on appeal the district court was affirmed.

The court further determined the district court correctly concluded it did not have discretion to sentence Levon Dean to 1 day of imprisonment for the underlying felony counts, as the district court said it would if it had discretion to do so, even though the 924(c) charges carried 5 and 25 year mandatory minimums. The panel stated *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007) was controlling in this case. The panel did not address whether *Pepper* had overruled *Hatcher* even though Levon Dean, Jr. presented that argument to the court in his brief.

Dean then timely filed a Petition for Rehearing or Rehearing *En Banc* to the United States Court of Appeals for the Eighth Circuit asking the Court to review the panel decision. The Petition for Rehearing or Rehearing *En Banc* was summarily denied.

The United States Court of Appeals for the Eighth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, which provides for review of a final order subject to appeal.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Eighth Circuit's decision is contrary to circuit courts of appeal cases deciding the application of the Hobbs Act to crimes involving robberies effecting commerce to the extent that the decision in this case establishes a defendant can be convicted of a Hobbs Act robbery pursuant to 18 U.S.C. § 1951 when the evidence submitted to the jury disclosed the victim was not involved in drug distribution effecting commerce during the time of the robbery nor was there any intent to rob a "drug dealer" by the defendant.

The Hobbs Act makes it a federal crime to attempt, conspire to, or actually commit a robbery that "in any way or degree, obstructs, delays or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). This Court has stated the Hobbs Act, "[S]peaks in broad language...to punish interference with interstate commerce by extortion, robbery or physical violence" in *Stirone v. United States*, 361 U.S. 212, 214 (1960). However, the Eighth Circuit's interpretation of the Act in this case exceeds even the broad language found therein.

To obtain a Hobbs Act conviction, the Government must present sufficient evidence that the robbery had an effect on commerce. *Stirone v United States*, 361 U.S. 212 (1960). The decision of the Eight Circuit in this case takes the burden of showing the effect on commerce away from the government and presumes the robbery of an individual, who at the time of the robbery was not involved in the business of drug distribution, is sufficient to support a Hobbs Act robbery conviction as long as the victim was, at some point in time prior to the robbery, engaged in drug distribution.

The evidence at trial established that Jessica Cabbell, had arranged to meet J.R. at a hotel in Sioux City, Iowa and provide a sexual encounter if Cabbell was allowed to use some of J.R.'s methamphetamine. Upon being informed of this encounter, Sara Berg decided that she wanted to collect on a debt owed to her by J.R. She enlisted the help of Jamal Dean and Levon Dean, Jr. to act as enforcers and accompany her to confront J.R. Cabbell had told J.R. that another woman was going to join her at the hotel at some time to party with them. After Jessica Cabbell had smoked some methamphetamine at the hotel with J.R., Berg and the Dean brother appeared and knocked on the door to the hotel room. The door was opened and they forced their way in. After making demand on the debt owed, they were told that he did not have the money to pay the debt. Levon Dean's brother, Jamal, then proceeded to ransack the hotel room taking anything of value belonging to J.R.

When asked if his practice was to sell methamphetamine, J.R. described himself "as more or less a user", that he possessed "methamphetamine for personal use and to share with others", that trafficking in methamphetamine was "not his livelihood", and when he shared methamphetamine it was "not to make money". J.R. indicated that the only methamphetamine he had that night was what was left in his meth pipe, and he had a total of three or four dollars with him in his car.

The Eighth Circuit Court of Appeals determined that, while J.R. was robbed by the Dean brothers to pay back a debt allegedly owed to Sara Berg, the evidence also indicated that J.R. was hoping to exchange methamphetamine for sex with Jessica Cabbell, and that interstate encounter was interrupted by Berg and the Deans before

the transaction was complete. As such, the robbery affected the victim's ability to buy and sell drugs in interstate commerce. (Appendix A1)

Levon Dean, Jr. submits that a defendant can not be convicted of a Hobbs Act robbery pursuant to 18 U.S.C. § 1951 when the evidence submitted to the jury disclosed the victim was not involved in drug distribution effecting commerce during the time of the robbery nor was there any evidence presented to the jury that an intent to rob a "drug dealer" by the defendant was present. This is a case similar to the scenarios discussed at the oral argument before this Court in *Taylor v. United States*, No. 14-6166 wherein the Court raised the question of whether an individual could be convicted under the Hobbs Act under different factual scenarios, including whether the victim was not active in the drug trade at the time of the robbery and whether a robber merely "stumbled upon" controlled substances during the course of an otherwise generic robbery. It appears from the argument the Court did not believe such issues were properly before the Court in *Taylor*. (Appendix A-3 20:7-22:3; 31:11-33:7)

Other federal circuit courts require evidence that the victim was actively engaged in drug trafficking or that the defendant believed the victim was actively engaged in drug distribution and was targeted for robbery because of that actual or believed drug distribution activity. For example, the Third Circuit affirmed a Hobbs Act robbery conviction where it was *proved* that *at the time of the robbery*, the victim was selling illegal drugs. *United States v. Walker*, 657 F.3d 160, 181 (3d Cir. 2011) The federal courts of appeal have upheld Hobbs Act convictions in cases similar to *Walker*. See, e.g.,*United States v. Capozzi*, 486 F.3d 711, 726 (1st Cir. 2007); *United States v.*

Parkes, 497 F.3d 220, 231 (2d Cir. 2007); *United States v. Williams*, 342 F.3d 350, 355 (4th Cir. 2003); *United States v. Partida*, 385 F.3d 546, 561 (5th Cir. 2004); *United States v. Bailey*, 227 F.3d 792, 798 (7th Cir. 2000); *United States v. McCraney*, 612 F.3d 1057, 1064–65 (8th Cir. 2010); *United States v. Cortes*, 757 F.3d 850, 865 (9th Cir. 2014)

In the instant case, the Eighth Circuit Court of Appeals has incorrectly expanded the reach of the Hobbs act in violation of Levon Dean Jr.'s rights to due process under the Fifth Amendment to the United States Constitution.

II. The United States Court of Appeals for the Eighth Circuit's decision is contrary to this court's decision in *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011) which overruled *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007) and related opinions from the Eighth Circuit to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence or sentences under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the 18 U.S.C. § 924(c) convictions. This decision is also in conflict with the Tenth Circuit Court of Appeals' decision in *United States v. Smith*, 756 F.3d 1179 (10th Cir. 2014).

At sentencing, Dean requested a variance from the advisory guideline range on the convictions for those counts which carried no mandatory minimum or mandatory consecutive sentencing provisions. Those convictions served as the basis for the 360 months of mandatory consecutive imprisonment required by the two aiding and abetting convictions under 18 U.S.C. § 924(c).. The district court stated that he did not believe, due to this Court's precedent as set forth in *United States v Hatcher*, 501 F.3d 931 (8th

Cir. 2007), he had the power to do so. The district court further stated, if he did have the power to do so he would have sentenced Dean to 360 months on the gun charges and a sentence of 1 day on the remaining counts.

Dean argued on appeal that the reasoning set forth by the Tenth Circuit Court of Appeals in *United States v. Smith*, 756 F.3d 1179 (10th Cir. 2014) should apply in this case. Specifically, Dean argued, employing the reasoning in *Smith*, supra., that *Hatcher* is no longer good law in light of this Court's clarification of the overriding directives of 18 U.S.C. §§ 3553 and 3661 in *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011). The Court in *Smith* concluded that a district court could consider the mandatory consecutive 924(c) sentences when sentencing an individual on the underlying felony.

Summarily, the Tenth Circuit Court of Appeals found that this Court's decision in *Pepper v. United States*, 562 U.S. 476, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011), sets forth that 18 U.S.C. § 3661 states "no limitation" may be placed on a court's power to consider information about a defendant's "background, character, and conduct" when seeking to fashion an appropriate sentence. Thus, by failing to consider the sentences imposed on the 924(c) charges, a court is essentially barred from considering an entire category of information about a defendant and risks contravening express Congressional intent in 18 U.S.C. § 3661. *Smith*, 756 F.3d at 1181-82 Further, the Tenth Circuit held that limiting the district court in this regard is not logically consistent with this Court's decision in *United States v. Watts*, 519 U.S. 148, 152, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) and there is no constitutional imperative that might prevent

sentencing courts from applying section 3661 to reduce the underlying crime of violence sentences in light of simultaneously issued § 924(c) sentences. *Smith*, 756 F.3d at 1182-1183.

The Tenth Circuit concluded:

> [I]t is apparent to us that nothing in current law prohibits a district court's considering a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence. Sentencing in this context may proceed just as it does elsewhere, with a humble recognition that "no more difficult task confronts judges than the determination of punishment' and '[e]ven the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge."

United States v. Smith, 756 F.3d 1179, 1193 (10th Cir. 2014), quoting, *Carter v. Illinois*, 329 U.S. 173, 178, 67 S.Ct. 216, 91 L.Ed. 172 (1946).

Levon Dean, Jr. believes the United States Court of Appeals for the Tenth Circuit was correct in its analysis of this issue in light of this Court's decisions addressing 18 U.S.C. § 3553(a) and therefore the Eighth Circuit Court of Appeals should have granted Levon Dean, Jr. relief on this issue. Because there is a circuit split on this issue Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

LEVON DEAN, JR., Petitioner.

BY: _____

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APPENDIX

Decision of the United States Court of Appeals, *United States v. Dean*, 810 F.3d 521 (8th Cir. 2015).....A-1

Order of the United States Court of Appeals for the Eighth Circuit denying petition for rehearing or rehearing *en banc*.....A-2

Excerpts from the Transcript of Oral Argument in *Taylor v. United States*, 14-6166.....A-3

United States Court of Appeals
For the Eighth Circuit

No. 15-1263

United States of America

Plaintiff - Appellee

v.

Levon Dean, Jr.

Defendant - Appellant

No. 15-1349

United States of America

Plaintiff - Appellee

v.

Jamal Dean

Defendant - Appellant

Appeals from United States District Court
for the Northern District of Iowa - Sioux City

Submitted: September 24, 2015
Filed: December 29, 2015

Before LOKEN, BEAM, and SHEPHERD, Circuit Judges.

BEAM, Circuit Judge.

Levon and Jamal Dean, brothers, appeal their convictions and sentences arising out of armed robberies of two Sioux City area drug dealers in violation of the Hobbs Act,[1] 18 U.S.C. § 1951, and related counts. We affirm the district court.[2]

I. BACKGROUND

Viewed in the light most favorable to the prosecution, the trial evidence established the following facts. On April 15, 2013, Jessica Cabbell visited her friend

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[1]The Hobbs Act proscribes robbery that affects interstate commerce, making what would often be a state crime, a federal crime. United States v. Dobbs, 449 F.3d 904, 911 (8th Cir. 2006). The Supreme Court has granted certiorari in a case that may ultimately limit the reach of the Hobbs Act in cases involving robbery of individual drug dealers. See United States v. Taylor, 754 F.3d 217 (4th Cir. 2014), cert. granted, 136 S. Ct. 26 (Oct. 1, 2015) (granting certiorari on the issue of whether the government can meet the interstate commerce element by relying exclusively on evidence that the robbery of a drug dealer is an inherent economic enterprise that satisfies the interstate commerce element of the offense). However, unlike the Fourth Circuit, our precedent requires the government to actually prove that robbery of a drug dealer is linked to interstate commerce, compare Taylor, 754 F.3d at 222-23, with United States v. McCraney, 612 F.3d 1057, 1064-65 (8th Cir. 2010), so we doubt that the ultimate outcome in Taylor will affect the instant case.

[2]The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa.

Reggie Galvin in South Sioux City, Nebraska. Sarah Berg was also at Galvin's, and Cabbell, a prostitute, told the other two she was scheduled to have a "date" with J.R., who was a known methamphetamine and marijuana dealer from LeMars, Iowa, later that night. Both women had previously dealt with J.R. as a drug dealer and had exchanged sex for drugs with him. However, J.R. apparently owed Berg money based upon the previous dealings, or according to Berg, had taken $400 of her money. Berg expressed a desire to collect that money. Berg and Galvin decided that in order to collect the money J.R. owed, they would need "muscle." It was agreed that the Dean brothers would provide the muscle.

The Deans arrived at Galvin's house, and then Berg, Cabbell, and the Deans proceeded to the Palmer House Motel in Sioux City, Iowa, where Cabbell's "date" with J.R. was to take place. Cabbell had informed J.R. that another woman would join them at some point, but did not tell J.R. that it would be Berg. Cabbell arrived alone at J.R.'s room, and she and J.R. smoked methamphetamine together. A bit later, Berg and the Deans arrived. Berg immediately confronted J.R. about the stolen money, while Jamal pulled a gun on J.R. and demanded the money in question. Meanwhile, Levon ransacked the room looking for money and drugs. Cabbell left the scene because she alleges she did not know a firearm would be involved. When J.R. reached for his car keys, Jamal hit J.R. on the head with the gun, and Berg took J.R.'s car keys, cell phone, and a pipe containing methamphetamine. Jamal threatened to kill J.R. if he called police. With Berg driving, Berg and the Deans drove away in J.R.'s car. Despite Jamal's warning, J.R. used the motel manager's cell phone to call 911 and report the robbery. Cabbell, Berg, and the Deans again met up at Galvin's house in Nebraska after the robbery and lamented the lack of spoils from the robbery.

On April 24, 2013, Levon and Jamal robbed another methamphetamine dealer (C.B.) in the dealer's home, at gunpoint. Jamal hit C.B. with his gun, and the Deans stole approximately $300 in cash, about 20 grams of methamphetamine, a digital scale, electronic and computer equipment, and old cell phones. The Deans ordered

Hope Marsh, who was living there, to pack her stuff because she was to come and live with them. She apparently complied, and the trio drove away in C.B.'s two cars. Sioux City police issued arrest warrants for the Deans, and Levon was arrested in Sioux City pursuant to the warrant. On April 29, police attempted to pull over a vehicle Jamal was riding in during a traffic stop. Because he knew about the warrant, Jamal instructed the car's driver to try to evade police. When the driver eventually did stop the car, Jamal jumped out and shot his rifle in an attempt to evade capture. Jamal eventually disposed of the loaded weapon in a nearby alley trash dumpster and escaped from authorities. He was eventually arrested in Texas in May 2013.

In April 2014, an eleven count, Third Superseding Indictment was returned charging Jamal, Levon, and Berg with: conspiracy to commit robbery under the Hobbs Act, in violation of 18 U.S.C. § 1951 (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. §§ 2 and 1951 (Counts 2 and 3); carjacking, in violation of 18 U.S.C. §§ 2 and 2119(1) (Counts 4 and 5); possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)(ii), and 924(c)(1)(C)(i) (Counts 6 and 7); being felons in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(3), and 924(a)(2) (Counts 8 and 9); and interstate transportation of a stolen vehicle, in violation of 18 U.S.C. §§ 2 and 2312 (Counts 10 and 11).[3] All three defendants filed motions to sever in which each argued that Berg's trial should be severed and tried separately. A magistrate judge[4] severed Berg's trial from the Deans', and Berg ultimately pleaded guilty to several counts and testified at trial against the Deans.

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[3]The original Count 8 was severed prior to trial, and the remaining counts were renumbered accordingly. Count 11, which was by then Count 10, was dismissed prior to reaching the jury.

[4]The Honorable Leonard T. Strand, United States Magistrate Judge for the Northern District of Iowa.

On August 29, 2014, the jury returned a verdict finding Jamal guilty on the offenses charged in Counts 1, 2, 3, 4, 6, 7, and 8, and acquitted him of the charges in Counts 5 and 9. The jury found Levon guilty of the charges in Counts 1, 2, 3, and 8, and acquitted him of the charges in Counts 4, 5, and 9. In addition, Levon was acquitted of the primary charges in Counts 6 and 7, but was found guilty on each count of the lesser included offense of possessing a firearm in furtherance of a crime of violence. The district court denied the motions for judgment of acquittal prior to the jury's verdict, and the post-trial motions for judgment of acquittal and new trial. Jamal's sentencing Guidelines range was 140-175 months in addition to mandatory consecutive minimums of seven and twenty-five years on the 18 U.S.C. § 924(c) counts. See 18 U.S.C. § 924(c)(1)(D)(ii) (mandatory consecutive sentence). However, the district court varied upwards to sentence Jamal to life in prison. Levon was sentenced to 400 months, which included a 360-month mandatory minimum consecutive sentence for the § 924(c) offenses. Without the mandatory minimums, Levon's Guidelines range was 84-105 months. Thus, the district court gave Levon a substantial downward variance of 40 months for the Guidelines sentence, which was by statutory directive consecutive to the 360-month mandatory sentence.

On appeal, Levon challenges the sufficiency of the evidence to establish a nexus to interstate commerce required for the Hobbs Act robberies; the sufficiency of the evidence for his firearm convictions; and the reasonableness of his sentence. Jamal argues the court erred in refusing to exclude in limine any reference to gangs or gang affiliation; there was insufficient evidence of the nexus to interstate commerce for the Hobbs Act robberies; the district court erred in refusing to give supplemental jury instructions regarding the nexus to interstate commerce; the government proved multiple, as opposed to a single, conspiracy and the district court's failure to give a proffered jury instruction in that regard; there was insufficient evidence to convict him of carjacking; the district court should have granted a new trial in the interests of justice; and his life sentence, imposed after the district court

heard hearsay testimony at the sentencing hearing, was procedurally flawed and violates due process.

II. DISCUSSION

A judgment of acquittal is only appropriate if the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). A guilty verdict should be overturned only if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Sanchez, 789 F.3d 827, 834 (8th Cir. 2015). Like the district court, we view the evidence in the light most favorable to the guilty verdict, and grant all reasonable inferences that are supported by that evidence. Id.

A. Hobbs Act

Both defendants assert that there was insufficient evidence linking the robbery of J.R., C.B., or both to interstate commerce to support a Hobbs Act violation. The district court denied this point in the post-trial motions, noting that our precedent quite liberally construes the nexus-to-commerce requirement in the Hobbs Act. Indeed, where a federal statute has an express jurisdictional nexus-to-commerce requirement, the crime's actual connection to interstate commerce may be quite small. United States v. McAdory, 501 F.3d 868, 871 (8th Cir. 2007).

The Deans reference a three-part test (originating in the Fifth Circuit, but cited with approval in United States v. Quigley, 53 F.3d 909, 910-911 (8th Cir. 1995)) to determine whether there is an adequate nexus to interstate commerce in a Hobbs Act case involving robbery of a drug dealer: (1) whether the robbery affected the victim's ability to buy and sell drugs in interstate commerce; (2) whether there is a likelihood that as a result of the robbery, the victim would have to deplete the assets of an entity engaged in commerce; and (3) whether the number of individuals victimized or the

sum at stake is so large that there will be a cumulative effect on interstate commerce. United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994). As we understand this test, only one of these three prongs must be met in order to establish the interstate-commerce nexus. Here, the first prong is met for both robberies. There is ample evidence that C.B. was robbed of an amount of methamphetamine (20 grams) that could have and would have been distributed by C.B. The evidence with regard to J.R. is less ample, but sufficient for the jury to convict on this count. The evidence indicates that J.R. was hoping to exchange methamphetamine for sex with Cabbell, and the interstate encounter was interrupted by Berg and the Deans before the transaction was complete.

Further, under our precedent, because the Deans robbed drug dealers, the offense arises under the Hobbs Act so long as there is any evidence regarding the interstate character of the drug dealing–i.e., that the drugs came from a different state than the dealings, that the dealer had customers in different states, or both. United States v. McCraney, 612 F.3d 1057, 1064-65 (8th Cir. 2010). And, because the transactions at issue took place in the Sioux City area, a metropolitan area reasonably encompassing three different states, the interstate nexus requirement was easily met in this case. Indeed, the evidence at trial indicated that C.B. received his methamphetamine from Nebraska and sold it in Iowa, South Dakota, and Nebraska. J.R. testified that he sold methamphetamine in South Dakota and Iowa.

The Deans argue that Quigley mandates a different result. In that case, we held that there was an insufficient nexus to interstate commerce when defendants robbed two intoxicated Native Americans of .80 cents and a pouch of chewing tobacco on a road between Valentine, Nebraska, and Crookston, Nebraska, where the victims were en route to purchase alcohol. 53 F.3d at 910-11. We rejected the government's argument that the robbery affected interstate commerce by preventing the victims from reaching the store to make their alcohol purchase. Id. at 911. For the reasons

stated above, the current factual scenario is much more similar to McCraney than Quigley and we affirm the Deans' Hobbs Act convictions.

B. Conspiracy

Jamal's next sufficiency argument is that instead of proving a single conspiracy, the evidence instead showed that there were multiple conspiracies–one to rob J.R. and another one to rob C.B.–resulting in a variance between the indictment and proof, and requiring a judgment of acquittal. Whether one conspiracy or multiple conspiracies have been proved is determined by the totality of the circumstances. United States v. Slagg, 651 F.3d 832, 842 (8th Cir. 2011). And, if a variance has occurred, reversal is warranted only if the variance infringed upon a substantial right. Id.

Jamal's argument that the robberies of J.R. and C.B. were not related enough to support a single conspiracy count is well taken. J.R. was robbed to pay back a debt allegedly owed to Berg, and the robbery of C.B. happened nine days later. However, as the government points out, the two robberies were similar in style, means, and motive, and both were carried out by the Deans. Jamal cites United States v. Delgado, 653 F.3d 729, 736 (8th Cir. 2011), in support of his argument that multiple conspiracies (as opposed to a single conspiracy) were proven in the instant case. In Delgado, the government was able to establish that a series of separate crimes was all part of one overarching agreement to conspire. It did so based upon evidence of significant overlap and connection between the conspirators in a large scale cocaine distribution scheme. Id. Jamal claims that such evidence is lacking in this case. Given our standard of review of the jury's verdict, we reject Jamal's arguments. The circumstantial evidence admitted at trial–the robberies were both committed by the brothers acting in concert; both targets were low-level methamphetamine dealers; both robberies took place in Sioux City; and the robberies occurred during a relatively short two-week time span–is enough to sustain the jury's verdict. And, even if there was a variance, such a variance was harmless error because it did not infringe on

Jamal's substantial rights. The evidence clearly showed Jamal participated in both robberies (and thereby both conspiracies) as the gunman. Because Jamal would have been guilty of both conspiracies, his substantial rights were not violated if two conspiracies were proven instead of one. Id.

Relatedly, Jamal argues there was no proof of an agreement regarding the alleged object of the conspiracy–to rob drug traffickers. Jamal argues that the reason the two men were robbed had very little to do with the fact that they were drug traffickers, and there was certainly no agreement to rob drug traffickers. The government asserts that the fact that Jamal chose known drug traffickers as the two victims of his robberies allowed the jury to infer that robbing drug dealers was the object of the conspiracy. Again, given our standard of review of the jury's verdict in a motion for judgment of acquittal, we reject Jamal's sufficiency arguments in this regard. Jamal argues that J.R. and C.B. were not big time drug dealers, and arguably J.R. did not come to Sioux City for the purpose of selling drugs, but those were arguments he also unsuccessfully made to the jury. In fact, the evidence showed that J.R. had in the past, and was that day again hoping to barter drugs for sex when contacted by Cabbell. Accordingly, there was sufficient evidence that J.R. was poised to exchange drugs for sex with Cabbell and that the Deans' agreement to rob him significantly thwarted that plan. Further, the 20 grams of methamphetamine taken from C.B. rather easily allowed the jury to infer an agreement to rob a drug dealer. Accordingly, Jamal's object-of-the-conspiracy argument is without merit.

C. Carjacking

Jamal next argues there was insufficient evidence to convict him of carjacking when he stole J.R.'s[5] vehicle following the robbery. A conviction pursuant to 18

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[5]Jamal and Levon were both acquitted of carjacking in Count 5, which was the incident with regard to C.B.'s vehicles.

U.S.C. § 2119 requires the government to prove that the defendant took a motor vehicle "from the person or presence of another" and "with the intent to cause death or serious bodily harm." Jamal argues there was no evidence that Jamal intended J.R. to suffer serious bodily harm as a result of the carjacking. The government responds that after Berg had taken J.R.'s car keys, Jamal's act of hitting J.R. in the head with the rifle and threatening to kill him if he called police satisfies the serious-bodily-injury element. We agree that there was evidence presented at trial of both the threat to J.R.'s life, in addition to the bloody wound, and later medical care following the blow to the head that would allow the jury to find this element of the offense. See United States v. Waldman, 310 F.3d 1074, 1078 (8th Cir. 2002) (holding that evidence of threats to kill during a carjacking if the driver did not follow instructions was sufficient to satisfy the serious bodily injury element); United States v. Garcia-Alvarez, 541 F.3d 8, 16 (1st Cir. 2008) (holding that the wound that left victim bleeding and requiring medical care and surgery satisfied the serious bodily injury element). Jamal seems to argue that, given that he had a gun at the scene, he certainly could have caused a more serious injury than he did. However, the government is not required to prove that Jamal caused the most serious injury possible. Here there was sufficient evidence of a serious bodily injury to satisfy the statute.

Jamal further argues that the lack of proximity of J.R. to the car at the time of his injury precludes conviction under § 2119. And Jamal asserts that the stolen car was incidental to the robbery and not an object of it. However, the defendant unsuccessfully made similar arguments in United States v. Casteel, 663 F.3d 1013, 1019-20 (8th Cir. 2011) (holding that the elements of the "carjacking statute may be satisfied when the victim of the carjacking is inside a building and the stolen car is parked outside"),[6] and Garcia, 541 F.3d at 16 (holding that the carjacking statute does

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[6]In Casteel, the defendant challenged the "presence of another" portion of the statute, while Jamal purportedly challenges the "bodily injury" element. However, we understand Jamal's argument to be a hybrid of the two–Jamal contends both that the injury itself was not serious, and that J.R.'s distance from the car prevented the

not require that the taking of a vehicle be the only or primary motive of the crime). Accordingly, we also deny Jamal's arguments in this regard. Because there was sufficient evidence that the injury to J.R. was indeed, serious, neither J.R.'s proximity (or lack thereof) to the vehicle itself nor the ultimate motive of the encounter with J.R. is dispositive.

D. Firearms Offenses

Levon argues there was insufficient evidence to convict him of possessing and aiding and abetting in the possession of a firearm. Levon contends that the verdict was contrary to the evidence at trial, which, he asserts showed that Jamal was the only one possessing or using the firearm during the robberies. In support, Levon cites Rosemond v. United States, 134 S. Ct. 1240, 1249-50 (2014) (holding that in order to be convicted of aiding and abetting in the possession of a firearm during another crime, the defendant must know beforehand that his confederate will carry a gun, and that once he did know, he did not walk away). Levon argues that he did not know beforehand that his brother Jamal would have a gun during the robberies and did not have the opportunity to walk away once he did know. After reviewing the trial transcript, we find Levon's arguments in this regard disingenuous. At least two witnesses described Jamal's "gun walk"–the way Jamal walked with a limp when hiding a gun in his pants. The jury could easily infer that if these witnesses knew how Jamal looked with a hidden gun, so too did Levon. The government further points out that Cabbell did exactly what Levon asserts he could not do in order to avoid the firearm prosecution–once she realized Jamal had a gun, she left the April 15 robbery premises because she does not "rob people with guns." Finally, following the April 15 robbery, it was even more obvious that Levon knew about Jamal's gun during the April 24 robbery, and the evidence shows that at one point during the April

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serious injury from being related to the car theft.

24 robbery, Levon actually held the firearm. Accordingly, this argument is without merit.

Jamal also argues the evidence is insufficient to convict him for possession of and brandishing a firearm in furtherance of a crime of violence. However, the evidence at trial clearly established he had a gun and used it during the robberies of J.R. and C.B. and during the carjacking. We understand Jamal's primary point on this issue to be that if we were to reverse the Hobbs Act and carjacking convictions, we would also need to vacate the firearms offenses that require predicate "crime of violence" offenses. Because we have not reversed Jamal's other convictions, his firearms arguments are without merit.

E. Pretrial and Trial Error

Jamal argues that the district court should have granted his motion in limine to exclude any evidence of his alleged gang affiliation, arguing that any mention of gangs was unduly prejudicial. See United States v. Ford, 761 F.3d 641, 649-50 (6th Cir.) (holding that gang affiliation evidence is inadmissible if there is no connection between the gang evidence and the charged offense), cert. denied, 135 S. Ct. 771 (2014). The government counters that despite the district court's failure to exclude gang membership in limine, there was no mention of gangs at trial. Further, the district court's reasoning not to categorically exclude the evidence prior to trial–because it may have been necessary for context–was sound. See United States v. Johnson, 28 F.3d 1487, 1497 (8th Cir. 1994) (holding that evidence of gang association may be necessary to show the nature and extent of the association between defendants). We review the district court's admission or exclusion of evidence for an abuse of discretion. United States v. Sewell, 457 F.3d 841, 843 (8th Cir. 2006). Having carefully reviewed the trial transcript, we agree with the government's assertion that there was no evidence of gang affiliation at trial. There was extensive evidence of gang affiliation at Jamal's sentencing hearing. However,

as we understand Jamal's argument, he is not challenging the specific content of the sentencing hearing testimony but instead the hearsay nature of it, a subject we will address below. Accordingly, this point is denied.

Jamal next makes several arguments regarding allegedly erroneous jury instructions. First, in relation to the previously discussed Hobbs Act argument, Jamal asserts that the district court erred in refusing to give his requested instruction that "interfering with commerce" is an element of the crime. However, Jamal requested this instruction for Count 1, which was the *conspiracy* to commit Hobbs Act robberies. The instruction as given read, "at some time during the period of the conspiracy–that is, from a date unknown until about April 29, 2013–in the Northern District of Iowa, two or more persons reached an agreement or understanding to commit robberies of drug traffickers." The government points out that the instruction adequately informed the jurors to find Jamal guilty if he agreed with another to commit robberies of drug traffickers. Indeed, longstanding Eighth Circuit precedent supports the government's interpretation. See Nick v. United States, 122 F.2d 660, 673 (8th Cir. 1941) (holding that government did not need to prove that defendants knew the effect of their conspiracy would be to affect interstate commerce; but rather that they agreed to do something, the natural effect of which was to affect interstate commerce). Further, the government points out that "interstate commerce" was defined in the jury instruction directly preceding the challenged instruction, and was specifically included as an element of the offense regarding Counts 2 and 3, the actual Hobbs Act counts. We review the district court's jury instructions for an abuse of discretion and will reverse only if the instruction did not fairly and adequately represent the evidence and law. United States v. Manes, 603 F.3d 451, 458 (8th Cir. 2010). Because the instruction fairly and adequately represented the evidence and the law, we deny this point.

Jamal also argues the district court erred in instructing the jury on possession, relating to his conviction on Count 8 for prohibited possession of a firearm and

ammunition. Possession was defined in the instructions as follows: "A person possessed something if all three of the following are true: the person knew about it, and the person had physical control over it or a vehicle in which it was concealed or transported, or the power, or ability, to control it, and the person had the intention to control it . . . ." Jamal claims the words "or transported" after the word "concealed" was inconsistent with constructive possession. The gist of Jamal's argument is that there may have been a firearm in the car that he did not know about and thereby would not have had constructive possession of it. This argument is without merit. The district court's instruction required the jury to find that Jamal had knowledge of any firearm, and indeed, the evidence supports the jury's finding. Jamal carried a firearm at all pertinent times in the underlying crime spree. Jamal used the firearm during a traffic stop on one occasion, and used it as a weapon to hit both J.R. and C.B. on the head at other times. Because the instruction fairly and adequately represented the evidence and the law, we reject this point.

Jamal's final complaint about the jury instructions is the district court's failure to give a multiple-conspiracy jury instruction. As recounted above, Jamal argues that the government proved two conspiracies, but only alleged one in the indictment. A single conspiracy is comprised of people sharing common objectives under one general agreement. United States v. Benford, 360 F.3d 913, 914 (8th Cir. 2004). As earlier noted, we found that there was sufficient evidence for the government to establish one single conspiracy. Accordingly, Jamal's lack of success on the merits of the multiple- versus single-conspiracy claim precludes him from prevailing on his claim that the district court erred in refusing to give his "multiple conspiracies" jury instruction.

F. New Trial

Based upon many of the foregoing arguments, Jamal argues that the weight of the evidence preponderates sufficiently against the verdicts so that a serious

miscarriage of justice will result unless a new trial is granted. Jamal focuses on the testimony of J.R. that he had told Cabbell prior to their April 15 encounter that he did not have any money to pay for sex, and therefore J.R.'s robbery did not affect interstate commerce. The standard for granting a motion for new trial is more lenient than for a judgment of acquittal; the court is allowed to vacate any judgment if the interests of justice so require. United States v. Knight, 800 F.3d. 491, 504 (8th Cir. 2015). However, the decision to grant or deny a motion for a new trial based upon the weight of the evidence is within the sound discretion of the trial court. Id. The district court thoroughly reviewed Jamal's request for a new trial and determined that the interests of justice did not so require. Given that we were not persuaded by Jamal's earlier discussed Hobbs Act arguments, we find no abuse of discretion in the district court's decision to deny a new trial.

G. Sentencing

Jamal and Levon both appeal certain aspects of their sentences. We review the district court's sentencing factual findings, including relevant conduct, for clear error, and its construction and application of the Guidelines de novo. United States v. Howard, 759 F.3d 886, 889 (8th Cir. 2014). Further, the district court has broad discretion at sentencing concerning the kind and source of the information it receives. United States v. Garcia, 774 F.3d 472, 475 (8th Cir. 2014) (per curiam). Further, a sentencing proceeding does not carry the same evidentiary protections as a trial and the court may consider uncorroborated hearsay evidence if it has sufficient indicia of reliability. Id.

Jamal's calculated sentencing Guidelines range was 140-175 months on counts 1, 2, 3, 4, and 9, in addition to mandatory consecutive minimums of seven and twenty-five years on the 18 U.S.C. § 924(c) counts. The district court varied upwards and sentenced Jamal to life in prison, reasoning that due to a number of violent incidents, both in regards to the charged conduct, and previous uncharged conduct,

the court needed to protect the public from Jamal. In so doing, the court heard testimony about these events from several individuals at the sentencing hearing, some of which constituted hearsay. Jamal contends that the district court procedurally erred in relying upon this hearsay testimony because there was not sufficient indicia of reliability to render this testimony reliable. The challenged testimony from three witnesses involved Jamal's alleged role in a 2012 incident wherein he allegedly shot a member of a rival gang, J.E., ostensibly in retaliation for J.E. stabbing a member of Jamal's gang. Two of the challenged witnesses were police officers who were told by numerous people that Jamal had committed the shooting. The third witness was a paramour of J.E. She testified that when J.E. awoke from a coma, he told her that Jamal had shot him. Interestingly enough, J.E. testified at the sentencing hearing and alleged he "did not see" who shot him, nor did he recall the conversation with his girlfriend in the hospital. However, an overriding theme from numerous of the non-law-enforcement witnesses at the sentencing hearing was that they were there under subpoena and duress because they were members of various rival gangs in the Sioux City area. On the other side of the coin, numerous of these same witnesses were hoping to receive leniency in their various criminal sentences in return for government-favorable testimony. At bottom, given the tenor and tone of the sentencing hearing after thoroughly reviewing the transcript, we agree with the district court's finding that the paramour's detailed account of the events pre- and post-shooting have sufficient indicia of reliability such that the district court could rely upon it, despite the fact that her testimony identifying Jamal as the shooter was clearly hearsay.

Furthermore, the district court's overall sentencing decision to vary upwards to protect the public from Jamal was not substantively unreasonable. We "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 51 (2007). "[I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district

court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Id. It was within the district court's considerable discretion to vary upwards and sentence Jamal to life in prison. The district court very thoughtfully considered Jamal's unusually active and violent criminal history for a defendant only twenty-three years old, and, it seems to us, rather reluctantly came to the conclusion that the only possible just sentence was life in prison. Accordingly, we affirm the district court's sentence.

Levon was subject to five-year and twenty-five-year mandatory sentences (360 months) for the 924(c) offenses. His Guidelines range was 84-105 months for the remaining counts. Levon requested that the district court sentence him to one day for the remaining counts, given the harshness of the 360-month mandatory sentences. The district court stated on the record that it would like to do just that, but felt it did not have the discretion to do so based upon our decision in United States v. Hatcher, 501 F.3d 931, 933-34 (8th Cir. 2007) (holding that a district court unreasonably varied downward in sentencing a defendant to one day for the crimes not subject to a mandatory minimum, solely because the mandatory sentence was 300 months). Levon argues that the district court erred when it ruled that it did not have discretion to impose a lower Guidelines sentence based upon the harshness of the mandatory minimums. We see no meaningful difference between the situation in Hatcher and what Levon requested in this case. Accordingly, the district court correctly noted his inability to sentence Levon as requested. Thus, we find that the district court's 40-month sentence, to be served consecutively with the 360-month sentence, for a total sentence of 400 months, was substantively reasonable and not an abuse of the district court's discretion.

III. CONCLUSION

We affirm the judgments of the district court in this well-tried, multiple-count, joint-defendant criminal case.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-1263

United States of America

Appellee

v.

Levon Dean, Jr.

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:13-cr-04082-MWB-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

February 12, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE SUPREME COURT OF THE UNITED STATES

- x

DAVID ANTHONY TAYLOR, :

Petitioner : No. 14-6166

v. :

UNITED STATES. :

- x

Washington, D.C.

Tuesday, February 23, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

DENNIS E. JONES, ESQ., Abingdon, Va.; on behalf of Petitioner.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

JUSTICE ALITO: Yeah, well, that's -- that's the -- that's what Raich -- that's the interpretation of the Commerce Clause.

Do you want the jury to decide what the Commerce Clause means? It would be an interesting -- under those who -- who think that juries once upon a time had the authority to decide legal issues. Do you want them to decide whether the majority or the dissent was correct in -- in Gonzales?

MR. JONES: No, sir, I would not. What I would -- what I'd like to have an opportunity in -- in this case was to address what we typically see as facts that constitute whether you're a drug dealer or whether you're not. And in this case there wasn't.

If you -- if you take -- if you look at the evidence that was -- that was produced, it's -- it's been embellished. But -- but the plain reading of the testimony -- for example, in the Lynch case, there was no showing that -- that the -- that they had actually been engaged in a drug dealing enterprise. It was rumored that a person had been robbed, not Mr. Lynch but a person had been robbed at some point in time in the past, I think of 20 pounds of marijuana.

In -- in the Worley case it was -- it just stated you -- you couldn't go anywhere that Mr. Worley

had acknowledged selling marijuana one time, about three or four years prior to this instance. There was simply no showing in the evidence of this case that you even had a commercial enterprise going, being conducted at either one of these residences. It's -- it -- it was an inference upon an inference.

JUSTICE KAGAN: Well, that seems to me a different kind of argument that you're making now. Now you're not saying that the question is whether the marijuana that was being dealt was intrastate or interstate. Now you're suggesting that what you really wanted to prove was that this person wasn't a dealer at all; is that correct?

MR. JONES: That's -- that's -- that's -- that's where we got here on this case, was -- was the absence of particularized evidence as to what was -- what was taking place here. And we weren't able to, pursuant to the rulings, we simply were not able to address that.

JUSTICE GINSBURG: Wasn't there evidence that this gang, that they were in -- in the business of trying to rob drug dealers because they thought they'd find either the drugs or the money?

MR. JONES: Mr. Fitzgerald, who, from the evidence of this case, I believe to be an organizer or

certainly one of the leaders in this -- in this group of individuals. Our client, Mr. Taylor, he -- he was added, I believe the evidence shows, for -- for these two events.

And the evidence in that case -- and judge -- even Judge Conrad, I -- I sense that he became a little frustrated and he tried to clear it up, because when you start reviewing the evidence concerning the Worley robbery -- when you start considering the evidence concerning the Worley robbery, Mr. Fitzgerald's testimony is, I don't know what's there. I don't know what to expect --

JUSTICE KENNEDY: I don't -- I don't understand where we're going here. It seemed to me a few minutes ago you said, oh, there's no evidence that he was a drug dealer. But that's not the question presented. Your question presented assumes that he's a drug dealer, so don't argue that.

MR. JONES: I'm -- I was trying -- I --

JUSTICE KENNEDY: So we know that there's a drug dealer here. We take the case on that basis.

MR. JONES: Yes, sir.

JUSTICE KENNEDY: All right. So we're talking about the interstate and local. So it seems to me that you've -- you just have not raised the point

that there was no evidence that he was a drug dealer.

MR. JONES: Well, what --

JUSTICE KENNEDY: It's not in your petition.

MR. JONES: Our -- our point in our petition was -- is that there was a failure to present particularized evidence of the impact or the effect on -- on interstate commerce as a result of the activities of these people, and we were precluded from addressing that.

The whole theory of the case in -- when it was presented in the district court, was -- was twofold; number one, that this interstate -- that the interstate commerce element had -- had not been met, and that there was no particularized evidence to show that this influence or this impact on commerce.

May I reserve?

CHIEF JUSTICE ROBERTS: Certainly, Mr. Jones.

Mr. Yang.

ORAL ARGUMENT OF ANTHONY A. YANG

ON BEHALF OF THE RESPONDENT

MR. YANG: Mr. Chief Justice, and may it please the Court:

Three characteristics of Petitioner's robberies underscore that this case falls within

this, and then -- and the judge instructs the jury that they've satisfied that burden?

MR. YANG: The defendant is entitled to present evidence that contradict all the relevant facts.

But the -- I think what you're asking about is whether the fact that this particular marijuana might have been grown in-State -- right? I think that's what you're saying -- would somehow undermine the jurisdictional element. And as a matter of law, it does not.

CHIEF JUSTICE ROBERTS: What --

JUSTICE KAGAN: Is it --

CHIEF JUSTICE ROBERTS: -- in any -- in a marijuana case, what evidence could a defendant put on that would prevent the establishment of the jurisdictional element?

MR. YANG: The defendant could show that there was not an attempt to rob a drug dealer of marijuana.

CHIEF JUSTICE ROBERTS: No. That goes to the first question of whether there was a robbery: Was there a robbery? Did it have an affect on -- on commerce within the jurisdiction of the United States?

MR. YANG: Right.

CHIEF JUSTICE ROBERTS: Is there any

evidence that a defendant could be allowed to introduce going to the second element?

MR. YANG: Well, if they were targeting marijuana in that robbery, as was the case here, from marijuana dealers who were trading --

JUSTICE KAGAN: But that's the question, Mr. Yang: From marijuana dealers.

I mean, it seems to me the defendant could say, no. I was targeting a home grower. You know, the kind of person from Raich. I just -- I was growing this marijuana for myself. I had no intention of ever selling it.

At that point, you wouldn't be robbing somebody who was engaged in commerce, right?

MR. YANG: Or, I was just robbing a house, and I happened to stumble upon this.

I mean, there are --

JUSTICE KAGAN: There are --

CHIEF JUSTICE ROBERTS: Yes, but those are two very different things. Robbing a house and stumbled upon is one thing, but if you have somebody who is robbing marijuana that's grown for home consumption or whatever, can the defendant say the jurisdictional element is not satisfied because of that?

MR. YANG: Well, I think home consumption

raises different issues, and I'll -- I'll tell you why. The Hobbs Act governs robberies that have an affect on commerce over which the United States has jurisdiction. There's some question whether just growing marijuana for your own use by itself is commerce, or whether it's an activity that affects commerce that would bring it within --

JUSTICE KENNEDY: Let's say --

MR. YANG: -- the element of Raich.

JUSTICE KENNEDY: Let's -- let's say that this Court had a decision that home-grown marijuana has an affect on interstate commerce. Let's say that that's -- then there's a trial. What instruction -- can -- can any evidence be introduced?

MR. YANG: Well, if the Court had said that just growing marijuana --

JUSTICE KENNEDY: Contest commerce part -- part of the indictment?

MR. YANG: I -- I think if you're -- if you're asking whether the Court has decided that growing marijuana is itself commerce over which the United States has --

JUSTICE KENNEDY: Let's -- let's assume -- let's assume the Court has decided that --

MR. YANG: Well, then there -- there's --

RECORD AND BRIEFS

ORIGINAL

No. 15-9260

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial evidence was sufficient to establish that petitioner's robbery of a dealer of illegal drugs "in any way or degree * * * affect[ed] commerce," in violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether a sentencing court, when sentencing a defendant who has been convicted of a firearms offense under 18 U.S.C. 924(c) and a predicate crime of violence, may reduce the sentence for the predicate offense to lower the aggregate sentence that results from the consecutive, mandatory-minimum sentence for the Section 924(c) offense.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1) is reported at 810 F.3d 521. The opinion of the district court is not published in the Federal Supplement but is available at 2014 WL 7339215.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2015. A petition for rehearing was denied on February 12, 2016 (Pet. App. A-2). The petition for a writ of certiorari was filed on May 4, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of conspiracy to commit Hobbs Act robbery and two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1); and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g). The district court sentenced petitioner to 400 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A-1.

1. In April 2013, petitioner and others both conspired to rob and robbed two drug dealers of drugs and other property on two occasions. Pet. App. A-1, at 2-4. Petitioner committed those offenses in an area around Sioux City, Iowa, where the state boundaries of Iowa, Nebraska, and South Dakota meet. Id. at 7.

a. Jeffrey Rollinger (J.R.) was a known methamphetamine and marijuana dealer who sold drugs in both Iowa and South Dakota. Although J.R. sold such drugs for money, he also had previously sold methamphetamine to Sara Berg (one of petitioner's codefendants) and Jessica Cabell (a prostitute) in exchange for sex. Berg believed that J.R. had stolen money from her and,

while at a home in South Sioux City, Nebraska, she hatched a plan with petitioner, petitioner's brother and co-defendant, and Cabell to rob J.R. when J.R. was scheduled to have a "date" with Cabell. They believed that J.R. would likely have drugs and money with him at that time. Pet. App. A-1, at 3, 7; Gov't C.A. Br. 10, 37-39; see 12/23/2014 D. Ct. Op. 2-3 (Doc. 343).

On April 15, 2013, the group traveled from the Nebraska residence (where they had conceived their plan) to the motel in Sioux City, Iowa, at which Cabell had agreed to meet J.R. for the "date." Cabell first met with J.R. in his motel room, and the two began to smoke methamphetamine. Berg, petitioner, and petitioner's brother subsequently entered the room; Berg confronted J.R. about the money; petitioner's brother demanded money from J.R. at gunpoint and hit J.R. with a rifle; and petitioner ransacked the room looking for drugs and money. The group, however, did not find any significant amount of drugs or money. They instead took J.R.'s pipe containing a small amount of methamphetamine, his cell phone, his car keys, and his car, which they drove back to Nebraska. Pet. App. A-1, at 2-3; Gov't C.A. Br. 10-11, 38-40.

b. Nine days later, on April 24, 2013, petitioner and his brother robbed another drug dealer, Craig Barclay. Barclay, like J.R., engaged in interstate drug dealing: Barclay obtained methamphetamine in Nebraska and sold it in Iowa, South Dakota,

and Nebraska. Petitioner and his brother robbed Barclay at gunpoint at his home in Sioux City, Iowa, obtaining approximately $300 in cash, 20 grams of the methamphetamine from Nebraska, a digital scale, other smaller items, and Barclay's two cars. Pet. App. A-1, at 3-4, 7; 12/23/2014 D. Ct. Op. 4-5; Gov't C.A. Br. 11-12, 41.

2. A federal jury found petitioner guilty on one count of conspiracy to commit Hobbs Act robbery (Count 1), in violation of 18 U.S.C. 1951(a); two counts of Hobbs Act robbery for the robberies of J.R. and Barclay (Counts 2-3), in violation of 18 U.S.C. 1951(a) and 2; two counts of possessing a firearm in furtherance of those crimes of violence (Counts 6 and 7), in violation of 18 U.S.C. 924(c)(1) and 2; and one count of possessing a firearm after having been convicted of a felony (Count 9), in violation of 18 U.S.C. 922(g). Judgment 1-2 (Doc. 366); Third Superseding Indictment 3-14 (Doc. 154); see Verdict 11-18 (Doc. 284). The district court rejected petitioner's motion for a judgment of acquittal, holding, as relevant here, that the evidence was sufficient to establish that petitioner's robberies of the drug dealers had an effect on commerce as required by the Hobbs Act. 12/23/2014 D. Ct. Op. 11-13.

At sentencing, petitioner argued that the district court should grant a downward variance for the non-Section 924(c) felony counts associated with each robbery. Sent. Tr. 4-11.

Although the three Hobbs Act counts and felon-in-possession count carried an overall advisory Sentencing Guidelines range of 84 to 105 months, petitioner argued that the court should impose concurrent sentences of just one day for the four felony counts because the two Section 924(c) counts already carried mandatory five- and 25-year consecutive sentences and because, in petitioner's view, an aggregate sentence of 30 years of imprisonment was sufficient. Id. at 4-5; see id. at 2; PSR ¶¶ 15-28. The district court concluded that it was not authorized to impose a one-day sentence if it deemed an aggregate sentence of thirty years to be sufficient; the court instead held that it must evaluate the sentences for the non-Section 924(c) counts and the Section 924(c) counts "separately." Sent. Tr. 13-14.

The district court stated that "if [it] was just looking at the conduct in [the non-Section 924(c) counts]," "there's no way" that it would "vary down to one day" from the 84 months at the bottom of the Guidelines range, and the court doubted that any "judge in the country" would grant such "an extraordinary variance." Sent. Tr. 7, 9. The court ultimately "var[ied] down[ward] from 84 months down to 40 months," which when added to the 30 years of imprisonment for petitioner's Section 924(c) counts, yielded a total sentence of 400 months of imprisonment. Id. at 12-13. The court noted that if petitioner were correct that it could impose a single sentence as "a combined package,"

the court would have sentenced him "to the two mandatory minimums which total 360 months and then g[a]ve 1 additional day" for his four remaining felony convictions. Id. at 13. If petitioner were to prevail on this issue on appeal, the court added, it would on remand reduce his sentence "to one day." Id. at 12.

3. The court of appeals affirmed. Pet. App. A-1. As relevant here, the court held that the evidence was sufficient to establish the Hobbs Act's commerce element, id. at 2 n.1, 6-8, and that the district court correctly rejected petitioner's request to impose a one-day sentence for his four non-Section 924(c) felony counts of conviction, id. at 17.

a. The court of appeals explained that the Hobbs Act makes it a federal offense to commit a "robbery that affects interstate commerce." Pet. App. A-1, at 2 n.1. Under its then-existing precedent, the court explained, the government must specifically prove in each case that a "robbery of a drug dealer is linked to interstate commerce" in order to establish a Hobbs Act violation. Ibid. That requirement, the court continued, was "unlike the Fourth Circuit['s]" rule in United States v. Taylor, 754 F.3d 217 (4th Cir. 2014), aff'd, 136 S. Ct. 2074 (2016), under which "the robbery of a drug dealer is [deemed] an inherent[ly] economic enterprise that satisfies the [Hobbs Act's] interstate[-]commerce element." Pet. App. A-1, at 2 n.1.

The court thus found it "doubt[ful]" that the "ultimate outcome in Taylor," which was then pending review on the merits in this Court, would affect the proper resolution of petitioner's case. Ibid.

The court of appeals concluded that the trial evidence showed that each of petitioner's robberies "affected the [drug-dealing] victim's ability to buy and sell drugs in interstate commerce." Pet. App. A-1, at 6-7. J.R., the court explained, not only engaged in interstate drug dealing because he sold methamphetamine in both South Dakota and Iowa, petitioner's robbery itself interrupted an "interstate encounter" in which J.R. was "hoping to exchange methamphetamine for sex with Cabell." Id. at 7. Barclay, the court added, also ran an interstate drug operation in which he obtained methamphetamine in Nebraska and "sold it in Iowa, South Dakota, and Nebraska"; and petitioner robbed methamphetamine from Barclay that Barclay otherwise "would have * * * distributed." Ibid.

b. On the sentencing question, the court of appeals concluded that the "district court correctly noted [its] inability to sentence [petitioner]" to just "one day for the [non-Section 924(c)] counts." Pet. App. A-1, at 17. The court explained that it had previously held in United States v. Hatcher, 501 F.3d 931, 933-934 (8th Cir. 2007), cert. denied, 552 U.S. 1170 (2008), that a district court had unreasonably "sentenc[ed] a

defendant to one day for the crimes not subject to [Section 924(c)'s] mandatory minimum." Pet. App. A-1, at 17. Because petitioner had identified "no meaningful difference between the situation in Hatcher and what [petitioner] requested in this case," the court concluded that the sentencing court did not abuse its discretion in declining to grant petitioner's request for a one-day sentence. Ibid.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the court of appeals erred in affirming his Hobbs Act conviction for robbing J.R. (Count 2) because, in petitioner's view, the evidence was insufficient to show either that J.R. was "involved in drug distribution [a]ffecting commerce during the time of the robbery" or that petitioner "inten[ded] to rob a 'drug dealer.'" The court of appeals correctly concluded that, even before this Court's Hobbs Act decision in Taylor v. United States, 136 S. Ct. 2074 (2016), the evidence was sufficient to sustain petitioner's Hobbs Act conviction because the evidence showed that petitioner's robbery targeted and stole drugs from a drug dealer who was engaged in interstate drug dealing and because the robbery would have had at least a "small" effect on J.R.'s "ability to buy and sell drugs in interstate commerce." Pet. App. A-1, at 6-7. This Court's decision in Taylor, which was

issued after petitioner filed his certiorari petition, now confirms that the judgment of the court of appeals is correct.

The Hobbs Act, as relevant here, makes it an offense to "in any way or degree obstruct[], delay[], or affect[] commerce * * * by robbery." 18 U.S.C. 1951(a). The Act further defines "commerce" to include any "commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). This Court in Taylor held that when a Hobbs Act prosecution is brought for "the robbery or attempted robbery of a drug dealer," the Act's commerce element is satisfied by proof that the "defendant knowingly stole * * * drugs or drug proceeds" because, "as a matter of law, the market for illegal drugs is 'commerce over which the United States has jurisdiction.'" 136 S. Ct. at 2081. "[T]he Government," the Court explained, thus "need not show that the drugs that a defendant stole * * * either traveled or were destined for transport across state lines." Ibid. And, the Court emphasized, "it makes no difference" that the "effect on commerce in a particular case is minimal." Ibid. Under Taylor, the evidence that petitioner robbed a known drug dealer and stole a small amount of methamphetamine from that dealer is sufficient to sustain his Hobbs Act conviction.

Indeed, the trial evidence is more than sufficient to establish the Hobbs Act's commerce element. The evidence showed that the robbery was intended to interrupt an interstate drug

transaction at a hotel in Iowa in which J.R. planned to exchange methamphetamine for sex with Cabell (a prostitute) who traveled to their meeting from Nebraska. Moreover, petitioner's robbery was designed to steal (and was somewhat successful in stealing) assets from J.R., the theft of which would have had some effect on J.R.'s ability to engage in interstate drug dealing. To the extent that petitioner contends that the evidence was insufficient to establish the historical facts as described by the district court and court of appeals, that fact-bound contention merits no further review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Petitioner contends (Pet. 11-13) that the district court was authorized to impose a "sentence of 1 day" for his three Hobbs Act felonies and his felon-in-possession offense to take account of the five- and 25-year mandatory consecutive sentences that must be imposed under Section 924(c) for his convictions for possessing a firearm in furtherance of the Hobbs Act robberies. Petitioner further contends (ibid.) that the court of appeals' contrary conclusion conflicts with this Court's decision in Pepper v. United States, 562 U.S. 476 (2011), and the Tenth Circuit's decision in United States v. Smith, 756 F.3d 1179 (2014). The decision of the court of

appeals is correct, and the sentencing question that petitioner presents does not warrant this Court's review at this time.

a. Section 924(c) makes it unlawful to possess a firearm in furtherance of a crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A). Any person who violates that prohibition "shall, in addition to the punishment provided for [the predicate] crime of violence or drug trafficking [offense]," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," shall "be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i). Section 924(c) further provides that, "[n]otwithstanding any other provision of law," no term of imprisonment imposed under Section 924(c) "shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed [for the predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii). Those provisions, when read in context of the sentencing provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 et seq.), reflect Congress's intent that sentencing courts (1) impose a criminal sentence for any non-Section 924(c) count of conviction that would be appropriate for the offense if committed without the Section 924(c) offense conduct and (2) impose the punishment for the Section 924(c) offense on top of such a

sentence. As this Court has observed, the "longstanding thrust" of Section 924(c) is "its insistence that sentencing judges impose additional punishment for § 924(c) violations." Abbott v. United States, 562 U.S. 8, 20 (2010); see id. at 25 (explaining that Section 924(c) "reiterate[s] [that command] three times"). Nothing in Section 924(c) or in the overall framework for sentencing established by the Sentencing Reform Act supports the "implausible" conclusion that Congress left courts free to negate the imposition of "additional punishment for § 924(c) violations," 562 U.S. at 20 (emphasis omitted), by zeroing out sentences for separate and simultaneous convictions.

The Sentencing Reform Act specifies distinct procedures for how sentencing courts should determine (1) the appropriate sentence of imprisonment for each individual offense for which a defendant is convicted, 18 U.S.C. 3582(a), and (2) the aggregate sentence when a defendant is convicted for multiple criminal offenses, 18 U.S.C. 3584(b). First, the length of each "term of imprisonment" must be determined by considering the factors in Section 3553(a), see 18 U.S.C. 3582(a), which requires the sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with [several statutory] purposes," 18 U.S.C. 3553(a), including the need to "reflect the seriousness of the offense" and "provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A). In doing so, the court must consider

"the nature and circumstances of the offense" and "the history and characteristics of the defendant." 18 U.S.C. 3553(a)(1).

Because a sentencing court must consider the particular circumstances of each offense, the court may increase a sentence for an offense to reflect the severity of the defendant's offense conduct if, for instance, the defendant possessed a firearm during that offense. See, e.g., Sentencing Guidelines §§ 2B3.1(b)(2) (recommending firearms enhancement under the robbery guideline), 2D1.1(b)(1) (recommending firearm enhancement under the drug guideline). If a defendant is convicted of both a crime of violence or drug-trafficking offense and a Section 924(c) offense for possessing a firearm in furtherance of the predicate crime, however, a court determining the sentence for the predicate offense may consider that Congress has already specified a separate punishment in Section 924(c) for the additional danger posed by the firearm. See Muscarello v. United States, 524 U.S. 125, 132 (1998) (purpose of Section 924(c), according to its chief sponsor, is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home") (citation omitted). The separate punishment under Section 924(c) is not displaced by the existence of a parallel conviction under a statute carrying its own firearms enhancement. Abbott, 562 U.S. at 23. But a sentencing court may exercise discretion under Section 3553(a) to set the length of the

sentence for the non-Section 924(c) offense without an enhancement for the involvement of a firearm. Indeed, the Sentencing Guidelines have long incorporated such a recommendation. See Sentencing Guidelines § 2K2.4, comment. (n.4).

When "a person [is] convicted of more than one offense," Section 3584 "provides the rules for determining the [overall] length of a term of imprisonment," S. Rep. No. 225, 98th Cong., 1st Sess. 125-126 (1983) (Senate Report), in light of the "multiple terms of imprisonment" imposed for those offenses. See 18 U.S.C. 3584(a). See also Senate Report 177 (explaining that "the sentences for each of the multiple offenses should be determined separately and the degree to which they should overlap be specified"). Section 3584 requires a sentencing court to determine "whether the terms imposed are to be ordered to run concurrently or consecutively" by "consider[ing], as to each offense for which a term of imprisonment is being imposed, the factors set forth in [S]ection 3553(a)." 18 U.S.C. 3584(b). That determination allows the sentencing court to set the length of the aggregate sentence (by running the individual sentences concurrently or consecutively) based on its own discretionary determination that the total duration of imprisonment is "sufficient, but not greater than necessary," to advance the goals of, for instance, providing "just punishment," affording an "adequate deterrence to criminal conduct," and protecting the public

from future crimes. 18 U.S.C. 3553(a) and (a)(2). Under that Section 3584 authority, a court can thus ensure that two or more prison sentences for different offenses do not result in a total punishment that in the court's view would be "greater than necessary" (18 U.S.C. 3553(a)) by ordering that the prison terms run concurrently. After the court has determined whether to run each such sentence concurrently or consecutively, the "[m]ultiple terms of imprisonment" are "treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. 3584(c).

The Sentencing Guidelines reflect that approach. Because the sentence of imprisonment for each offense must be based on the "circumstances of th[at] offense," 18 U.S.C. 3553(a)(1), the Guidelines generally require a sentencing judge to evaluate as a group all closely related counts and then to determine an overall offense level for such related offense conduct. See Sentencing Guidelines §§ 3D1.1(a)(1)-(2), 3D1.2, 3D1.3. After a combined offense level is determined for all groups of closely related counts, see §§ 3D1.1(a)(3), 3D1.4, that offense level determines the total punishment that the Guidelines recommend be imposed (subject to any statutory maximum punishment) "on <u>each</u> * * * count" of conviction, except those (like Section 924(c)) for which a consecutive term of imprisonment must be imposed by statute. § 5G1.2(b) (emphasis added). "If the sentence imposed

on the count carrying the highest statutory maximum is adequate to achieve the total punishment," the Guidelines recommend that (to the extent allowed by law) the "sentences on all counts [should] run concurrently." § 5G1.2(c). Otherwise, the sentencing court should direct that the "sentence imposed on one or more of the other counts shall run consecutively" "to the extent necessary" to produce what the court deems to be an appropriate total punishment. § 5G1.2(d). Cf. Senate Report 165 (stating that the Guidelines should address "the appropriateness of concurrent, consecutive, or overlapping sentences").

Section 924(c) modifies that normal mode of sentencing. See United States v. Gonzales, 520 U.S. 1, 6, 9-10 (1997). Although the sentencing court is still required to determine the "length of the term" of imprisonment for each offense (see 18 U.S.C. 3582(a)) such that the term of imprisonment on each individual count is "sufficient" to "reflect the seriousness of" and to "provide just punishment for the offense" at issue, 18 U.S.C. 3553(a) and (a)(2)(A), Congress partially displaced the court's authority under Section 3584(b) to tailor the aggregate sentence based on the court's discretionary determination that the total length will be "sufficient, but not greater than necessary," to advance the objectives listed in Section 3553(a). Congress did so in Section 924(c) by prohibiting the sentencing court from making any term of imprisonment imposed under Section 924(c)

"run concurrently with any other term of imprisonment." 18 U.S.C. 924(c)(1)(D)(ii). The term of imprisonment for a Section 924(c) offense thus must be imposed "in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A); see Gonzales, 520 U.S. at 10.

As a result, a sentencing court must determine the appropriate sentence for all non-Section 924(c) counts and must then "independently" impose a Section 924(c) sentence to run consecutively to all other terms of imprisonment. Sentencing Guidelines § 5G1.2(a) & comment. (n.2(A)). Nearly all courts of appeals to have addressed the issue have concluded that a sentencing court may not reduce the sentence for a predicate offense under 18 U.S.C. 3553(a) simply to lower the aggregate sentence that results from the consecutive, mandatory-minimum sentence for a Section 924(c) offense. See, e.g., United States v. Williams, 599 F.3d 831, 834 (8th Cir.) (applying United States v. Hatcher, 501 F.3d 931, 933-934 (8th Cir. 2007), cert. denied, 552 U.S. 1170 (2008)), cert. denied, 559 U.S. 1084 (2010) (No. 09-9733); United States v. Calabrese, 572 F.3d 362, 369-370 (7th Cir. 2009) (reaffirming United States v. Roberson, 474 F.3d 432, 436 (7th Cir. 2007)), cert. denied, 559 U.S. 1005 (2010) (No. 09-446); United States v. Chavez, 549 F.3d 119, 131-135 (2d Cir. 2008); United States v. Franklin, 499 F.3d 578, 583-586 (6th

Cir. 2007); see also, e.g., United States v. Powell, 444 Fed. Appx. 517, 522 (3d Cir. 2011) (not precedential), cert. denied, 132 S. Ct. 1907 (2012) (No. 11-7849); United States v. McCullers, 395 Fed. Appx. 975, 978 (4th Cir. 2010) (per curiam) (not precedential), cert. denied, 562 U.S. 1246 (2011) (No. 10-8472).[1]

The district court in this case correctly sentenced petitioner to 40 months of concurrent imprisonment on each of his three Hobbs Act counts and his felon-in-possession count. The "length of the term [of imprisonment]" for each of those counts was determined based on "the factors set forth in section 3553(a)," 18 U.S.C. 3582(a), in order to be "sufficient" to reflect, inter alia, the "nature and circumstances of [each] offense" and to "provide just punishment for the offense," 18 U.S.C. 3553(a) and (a)(2). The district court explained that the 40-month term was an appropriate downward variance from the 84- to 105-month Guidelines range for the offenses. Sent. Tr.

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[1] Two courts of appeals that considered this Section 924(c) issue before this Court held the Guidelines advisory in United States v. Booker, 543 U.S. 220 (2005), reached different conclusions. Compare United States v. Webster, 54 F.3d 1, 4 (1st Cir. 1995) (holding that the proper resolution of the question "had no impact on the [defendant's] sentence," but stating that, "in departing from a guideline sentence the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence"), with United States v. Working, 287 F.3d 801, 807-808 (9th Cir. 2002) (concluding that "the Sentencing Guidelines take into account the impact of 18 U.S.C. § 924(c), and thus the mandatory consecutive sentence is not a basis for a downward departure").

12. And that Guidelines range, consistent with Section 2K2.4, comment. (n.4), did not include a firearms enhancement. PSR ¶¶ 19, 30.

But the court made clear that "just looking at the conduct in [the Hobbs Act] Counts," "there's no way [it] would * * * vary down to one day" and that no "judge in the country" would likely do so. Sent. Tr. 9. Although "[n]ormally, a district court has authority to decide whether federal prison terms should run concurrently with or consecutively to other prison sentences," Gonzales, 520 U.S. at 6 (citing 18 U.S.C. 3584(a)), thus allowing a court to take into account the aggregate sentence produced by multiple counts of conviction, Section 924(c) divests the court of that authority. And the district court here correctly concluded that it lacked discretionary authority to achieve the equivalent result by reducing petitioner's sentence, as he requested, to one day. See Sent. Tr. 12. If the district court had sentenced petitioner to only one day for the non-Section 924(c) offenses instead of the 40 months that it deemed appropriate based on the nature of those felony offenses, the district court would have reached precisely the same result prohibited by Section 924(c): The 40-month sentences would have effectively been made to run concurrently with the term of imprisonment imposed by Section 924(c) with only one day of consecutive imprisonment.

b. Petitioner contends (Pet. 11-12) that the decision of the court of appeals in this case "is contrary to this [C]ourt's decision in Pepper," which discussed 18 U.S.C. 3553 and 3661 and which, in petitioner's view, "overruled" the Hatcher decision that the panel followed here. That is incorrect.

Pepper neither conflicts with nor overrules Hatcher or any other relevant Section 924(c) sentencing decision. Pepper concluded that Congress's enactment of Section 3661 "codified the 'longstanding principle that sentencing courts have broad discretion to consider various kinds of information'" about a defendant. 562 U.S. at 488 (citation omitted). Section 3661 does so by providing that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a sentencing court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Pepper also discussed the Section 3553(a) factors informed by such information, including the defendant's history and characteristics and the need to provide an adequate deterrence and to protect the public. 562 U.S. at 491-492. Pepper then ultimately held that a sentencing court may consider evidence of postsentencing rehabilitation when resentencing a defendant. Id. at 481, 493.

Those conclusions do not address the question presented here. The government does not contend that a district court

must blind itself to any relevant facts, nor does it argue that Section 3661 allows information to be excluded from the court's consideration. Quite the contrary, the Guidelines, whose advice the court must consider, decline to enhance the sentence for a predicate offense based on the defendant's possession, brandishing, use, or discharge of a firearm during that offense if the defendant has also been convicted of committing a Section 924(c) offense in connection with that predicate offense. See Sentencing Guidelines § 2K2.4, comment. (n.4). Such an enhancement is unwarranted, the Commission concluded, because the Section 924(c) punishment specified by Congress already accounts for the distinct involvement of the firearm in the offense. A district court exercising its sentencing discretion may still elect to enhance the punishment on the non-Section 924(c) conviction when a firearm is involved in the offense. But it may also consider that Congress has specified a separate punishment under Section 924(c) for the additional danger of possessing or using a firearm during the predicate offense and consider that factor in exercising discretion in sentencing on the non-Section 924(c) count under Section 3553(a). What it may not do is negate punishment on the Section 924(c) offense because of a conclusion that the Section 924(c) conviction is by itself sufficient to provide sufficient punishment. See pp. 11-19, supra.

c. Petitioner argues (Pet. 12-13) that the court of appeals' decision conflicts with the Tenth Circuit's divided decision in Smith, which held that a sentencing court may "consider[] a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence." 756 F.3d at 1193. The result in Smith conflicts with the result in this case and the result in other courts of appeals in similar cases, based on Smith's conclusion that the provisions in Section 924(c) requiring consecutive sentences and "addition[al]" punishment did not divest the district court of authority to consider the aggregate sentence as relevant to determining the sentence for a related non-Section 924(c) crime. Smith's reasoning, however, does not address the statutory provisions described above, including the interaction between Section 3584 and Section 924(c). The government did not present those arguments in Smith, see U.S. Br. at 24-30, United States v. Smith, No. 13-1112 (10th Cir.) (filed Sept. 3, 2013), and it did not seek rehearing in that case. As explained below, this Court's review is unwarranted at this time.

Smith begins with the premise that requiring a district court to disregard a defendant's conviction under Section 924(c) would require the court to take a "blinkered view" when sentencing a defendant on non-Section 924(c) counts, forcing it to "studiously ignore" the aggregate length of the prison sentences

that would result after any Section 924(c) sentences are consecutively stacked on the others. 756 F.3d at 1180. Like petitioner, Smith relies on the fact that Section 3661 instructs that "[n]o limitation" should normally be imposed on the information that a sentencing court may consider. Id. at 1181-1183. Indeed, Smith notes that the Sentencing Guidelines show that "a [Section] 924(c) sentence should influence (and serve to reduce)" the sentence for an underlying predicate offense because, when a defendant is convicted of a Section 924(c) offense, applying a firearm enhancement to the predicate offense would result in duplicative punishment. Id. at 1188. Smith additionally emphasizes that "[Section] 3553(a) directs courts to 'impose a sentence sufficient, but not greater than necessary, to comply'" with statutory sentencing goals. Id. at 1183 (quoting 18 U.S.C. 3553(a)).

Those points in Smith -- with which the government generally agrees -- do not address the key issue here. Nothing in Smith deals with the way in which Section 924(c) displaces the ordinary authority of a court under Section 3584(b) to consider and determine the aggregate length of all terms of imprisonment in light of the Section 3553(a) factors by running sentences either consecutively or concurrently, and the implications of that statutory scheme for sentencing. Indeed, Smith neither cites nor discusses that Section 3584 authority.

Smith thus arrived at a conclusion that is just as anomalous as the conclusion that this Court rejected in Abbott as inconsistent with Section 924(c)'s "longstanding thrust." 562 U.S. at 20. Abbott rejected, as producing "sentencing anomalies Congress surely did not intend," arguments that would result in no punishment being imposed under Section 924(c) because of the punishment imposed under other counts of conviction. 562 U.S. at 21. Smith produces the equally anomalous, converse result: a court may effectively negate punishment on a non-Section 924(c) offense because the defendant is being punished under Section 924(c). The interaction of Section 3584 and Section 924(c), read together with the count-by-count framework of sentencing law, refutes that conclusion.

The government has yet to present its current arguments to the Tenth Circuit, which may adopt them, thus obviating any need for further review in this Court. Moreover, since Smith, which the Tenth Circuit decided only two years ago, the only courts of appeals to have addressed the question presented are those with prior binding precedent on the issue. No court of appeals since Smith has therefore addressed the question afresh. Given the relatively new and quite limited division of authority on the question presented, intervention by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2016

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Supreme Court, U.S.
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No. 15-9260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

RECORD
AND
BRIEFS

LEVON DEAN, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I. 18 U.S.C. § 924(c) does not forbid a district court from varying downward to reach an appropriate aggregate sentence in a specific case after consideration of all the relevant sentencing factors under 18 U.S.C. 3553(a).

The Government contends that 18 U.S.C. § 924(c) precludes a sentencing court from determining an aggregate sentence on all counts of conviction which is "sufficient, but not greater than necessary", as directed by 18 U.S.C. § 3553(a), to advance the purposes of sentencing. (Brief in Opposition pp. 16- 23) It is Petitioner's position that this conclusion is not supported by any statutory language cited by the Government. Clearly, the requirement is for the district court to determine a sentence for the underlying substantive offense and the mandatory 924(c) sentence is to be imposed "in addition to the punishment provided for such crime..." and is to be served consecutive to that sentence. 18 U.S.C. § 924(c)(1) and (c)(1)(D)(ii) Nothing in Section 924(c) nor Section 3584 prohibits the sentencing court from exercising sentencing discretion in determining the aggregate sentence after following the directives of § 924(c).

The Tenth Circuit Court of Appeals reached that conclusion in *United States v. Smith*, 756 F.3d 1179 (2014) by comparing the language in 18 U.S.C. § 1028A(a) with the language in § 924(c). The *Smith* court concluded that such comparison shows that Congress, "...knows exactly how to alter traditional sentencing practices when it wishes, that when it does so it does so in ways and places clear enough for all to see—and that it has done nothing of the kind in § 924(c)." In § 1028A Congress included the following language: "In determining any term of imprisonment to be imposed for the felony during which the [identity theft occurred], a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section[.]" Thus this language is, "Proof that Congress knows

exactly how to strip district courts of their traditional sentencing discretion when it wishes to do so. Further proof too that § 924(c) lacks any such command." *Smith*, 756 F.3d at 1185-1186 (10th Cir. 2014)

The district court in this case followed the required sentencing procedures. The court first determined the advisory sentencing range under the United States Sentencing Guidelines for the underlying offenses and both Section 924(c) counts. (Sent Tr. 2) The court then considered Dean's objections to the Presentence Investigation Report. (Sent Tr. 3-4) The court then considered Dean's request to vary downward. The district court believed that legal precedent kept him from reducing the total sentence for the underlying offense to one day. The district court stated, "If I could look at a combined package, I totally agree with you, Mr. Stoler, that 360 months plus 1 day on Counts 1 through 3 is more than suff – not just sufficient and not greater than necessary. In my view it's more than sufficient for a sentence in this case." (Sent. Tr. 13)

Finally, merely because the Government failed to present its current argument in *United States v. Smith*, *supra*., and believes that once presented to the Tenth Circuit that court "may adopt them", does not mean this Court should not resolve the issue. (Brief in Opposition p. 24) As the Government admitted, the only other courts of appeal to have addressed the issue since *Smith* was decided have prior binding precedent on the issue. (Brief in Opposition p. 24) In *United States v. Ikegwuonu*, 826 F.3d 408 (7th Cir. 2016)(rehearing and rehearing *en banc* denied July 20, 2016) a three-judge panel refused to over turn circuit precedent as the question was not properly before them on appeal. Petitioner is unable to find any other courts of appeal who have addressed this issue after *Pepper v. United States*, 562 U.S. 476 (2011) and after *United States v. Smith*, *supra*. The remaining courts of appeal continue to operate under binding precedent on this matter and are unlikely to rule contrary to that

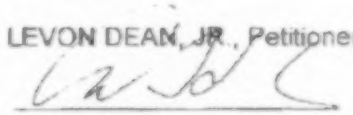
precedent absent intervention by this Court.

Petitioner submits this court should grant the Writ of Certiorari in this case to determine whether, "[T]he length of a § 924(c) sentence can at least sometimes bear legitimate relevance to the sentencing considerations (like the time needed to ensure the protection of the public) that Congress has statutorily directed courts to consider when sentencing for the underlying crime." *United States v. Smith*, 756 F.3d 1179, 1192 (10th Cir. 2014)

CONCLUSION

For the foregoing reasons, and the reasons previously submitted in the Petition for Writ of Certiorari, the Petition should be granted.

LEVON DEAN, JR., Petitioner

BY: 

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

LEVON DEAN, JR.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE

I hereby certify the Reply Brief filed on behalf of Levon Dean, Jr. was delivered to the Clerk's Office of the United States Supreme Court, 1 First Street, N. E., Washington, DC 20543, postage and fees paid *via* third-party commercial carrier FedEx. I hereby certify that a true and correct paper copy of the foregoing Reply Brief was delivered postage and fees paid via third-party carrier Fedex to:

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RECORD AND BRIEFS

No. 15-9260

DEC 16 2016

IN THE

Supreme Court of the United States

LEVON DEAN, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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U.S. District Court
Northern District of Iowa (Western Division)
CRIMINAL DOCKET
FOR CASE #: 5:13-cr-04082-MWB-2

Case title: USA v. Dean et al
Other court case number: 13 mj 239 Levon Dean

Assigned to: Judge Mark W Bennett
Referred to: Magistrate Judge CJ Williams

Appeals court case number: 15-1263
8th Circuit Court of Appeals

RELEVENT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
09/17/2013	4	SEALED Indictment as to Defendant Jamal Dean (1) on Counts 1, 2, 3, 4, 5, 6, 7 and 8: Defendant Levon Dean (2) on Counts 1, 2, 3, 4, 5, 6 and 8: Defendant Sarah Berg (3) on Count 1, 3, 5 and 8: Voting record in vault (Attachment # 1 Unredacted Version) (eUSA, eUSM, eUSP) (kfs) (Entered: 09/18/2013)

DATE	NO.	DOCKET TEXT
10/01/2013	21	MINUTE Entry for proceedings held before Magistrate Judge Leonard T Strand: Initial Appearance and Arraignment as to Defendant Levon Dean Jr (2) Count 1,2,3-4,5, 6,8 held on 10/1/2013. Attorney Doug Roehrich for defendant, and defendant pled not guilty. Indictment shall be deemed amended to reflect defendants name as Levon Dean Jr. Defendant is detained. (Court Reporter FTR Gold.) (djs) (Entered: 10/01/2013)
10/24/2013	41	SUPERSEDING Indictment as to Defendant Jamal Dean (1) on Counts 1s, 2s-3s, 4s-5s, 6s, 7s, 8s, 9s, Defendant Levon Dean, Jr (2) on Counts 1s, 2s-3s, 4s-5s, 6s, 7s, 9s, Defendant Sarah Berg (3) on Counts 1s, 2s, 4s, 6s, 9s. (Attachment: # 1 Unredacted Version) (kfs) (Entered: 10/25/2013)
03/19/2014	131	SECOND SUPERSEDING Indictment as to Jamal Dean (1) count(s) 1ss, 2ss-3ss, 4ss-5ss, 6ss, 7ss, 8ss, 9ss, Levon Dean, Jr (2) count(s) 1ss, 2ss-3ss, 4ss-5ss, 6ss, 7ss, 9ss, Sarah Berg (3) count(s) 1ss, 2ss, 4ss, 6ss, 9ss. Voting record in vault. (Attachments: # 1 Unredacted) (des) (Entered: 03/20/2014)

DATE	NO.	DOCKET TEXT
04/16/2014	154	THIRD SUPERSEDING Indictment as to Defendant Jamal Dean (1) on Counts 1sss, 2sss, 3sss, 4sss, 5sss, 6sss, 7sss, 8sss, 9sss, 10sss and 11sss: Defendant Levon Dean Jr (2) on Counts 1sss, 2sssk 3sss, 4sssk 5sss, 6sss, 7sss, 9sss, 10sss and 11sss: Defendant Sarah Berg (3) on Counts 1sss, 2sss, 4sss, 6sss, 9sss and 10sss (Attachment # 1 Unredacted Version) (kfs) (Entered: 04/17/2014)
08/25/2014	275	MINUTE Entry for proceedings held before Judge Mark W Bennett: Pretrial Conference, Voir Dire, Day 1 Jury Trial held on 8/25/2014 as to Jamal Dean, Levon Dean Jr (Court Reporter Shelly Semmler) (des) (Entered: 08/26/2014)
08/26/2014	276	MINUTE Entry for proceedings held before Judge Mark W Bennett: Day 2 of Jury Trial as to Defendants Jamal Dean and Levon Dean Jr held on 08/26/2014 (Court Reporter: Shelly Semmler) (kfs) (Entered: 08/26/2014)
08/27/2014	277	MINUTE Entry for proceedings held before Judge Mark W Bennett: Day 3 of Jury Trial as to Defendants Jamal Dean and Levon Dean Jr held on 08/27/2014 (Court Reporter: Shelly Semmler) (kfs) (Entered: 08/27/2014)

DATE	NO.	DOCKET TEXT
08/28/2014	279	INSTRUCTIONS to the Jury as to Defendant Jamal Dean, Levon Dean, Jr. Signed by Judge Mark W Bennett on 8/25/14. (djs) (Entered: 08/28/2014)
08/29/2014	281	MINUTE Entry for proceedings held before Judge Mark W Bennett: Day 4 of Jury Trial as to Defendants Jamal Dean and Levon Dean Jr held on 08/28/2014 (Court Reporter: Shelly Semmler) (kfs) (Entered: 08/29/2014)
08/29/2014	282	Jury Questions with Answer of the Court to Jury Question as to Defendants Jamal Dean, Levon Dean, Jr signed by Judge Mark W Bennett. (Attachments: # 1 Unredacted Jury Question) (djs) (Entered: 08/29/2014)
08/29/2014	283	MINUTE Entry for proceedings held before Judge Mark W Bennett: Day 5 Jury Trial as to Defendants Jamal Dean, Levon Dean Jr held on 8/29/2014. Jury verdict is reached. (Court Reporter Shelly Semmler) (des) (Entered: 08/29/2014)

DATE	NO.	DOCKET TEXT
08/29/2014	284	JURY VERDICT as to Defendants Jamal Dean (1) Guilty on Counts 1sss, 2sss, 3sss, 4sss, 6sss, 7sss, 9sss and Levon Dean Jr (2) Guilty on Counts 1sss, 2sss, 3sss, 9sss; Levon Dean Jr (2) Guilty of Lesser Offense Counts 6sss, 7sss; Jamal Dean (1) Not Guilty on Counts 5sss, 10sss and Levon Dean Jr (2) Not Guilty on Counts 4sss, 5sss, 10sss. (Attachments: # 1 Unredacted) (des) Modified text on 9/3/2014 (des). (Entered: 08/29/2014)
09/03/2014	289	JUDGMENT Of Acquittal as to Defendant Levon Dean Jr. Defendant, Levon Dean Jr, is acquitted as to Counts 4, 5, and 9 of the Third Superseding Indictment (Count 10sss renumbered as Count 9 for jury trial purposes). Signed by Judge Mark W Bennett on 9/3/2014. (des) (Entered: 09/03/2014)
09/05/2014	296	MOTION to Extend Time to File Rule 29/33 Motions filed by Defendant Levon Dean Jr (Stoler, Alan) (Entered: 09/05/2014)

DATE	NO.	DOCKET TEXT
09/08/2014	297	ORDER granting re 295 MOTION for Extension of Time to File Motion for New Trial and Motion for Judgment of Acquittal filed by Jamal Dean and 296 MOTION to Extend Time to File Rule 29/33 Motions filed by Levon Dean, Jr. Defendants shall file their motions for judgment of acquittal and new trial on or before 11/7/2014. No further extensions will be granted absent extraordinary circumstances. Signed by Judge Mark W Bennett on 9/8/14. (djs) (Entered: 09/08/2014)
10/30/2014	317	MOTION for Acquittal, MOTION for New Trial by Levon Dean, Jr. (Attachments: # 1 Brief In Support) (Stoler, Alan) (Entered: 10/30/2014)
12/23/2014	343	MEMORANDUM OPINION AND ORDER denying 318 Motion for Acquittal and Motion for New Trial as to Jamal Dean (1) and denying 317 Motion for Acquittal and Motion for New Trial as to Levon Dean Jr (2). Signed by Judge Mark W Bennett on 12/23/14. (djs) (Entered: 12/23/2014)
01/16/2015	347	SEALED Sentencing Memorandum By Defendant *Levon Dean,Jr.* as to Defendant Levon Dean, Jr (Stoler, Alan) (Entered: 01/16/2015)

DATE	NO.	DOCKET TEXT
01/16/2015	353	SEALED Presentence Investigation Report *Amended and Final Presentence Report with Sentencing Worksheet attached* by USA, Pat Korth, US Probation, Levon Dean, Jr as to Defendant Levon Dean, Jr (Attachments: # 1 Sentencing Worksheet) (Kuehl, Kelly) (Entered: 01/16/2015)
01/17/2015	356	SUPPLEMENT/ADDENDUM 347 Sealed Sentencing Memorandum by Defendant Levon Dean, Jr (Stoler, Alan) (Entered: 01/17/2015)
01/23/2015	364	MINUTE Entry for proceedings held before Judge Mark W Bennett: Sentencing held on 1/23/2015 as to defendant Levon Dean, Jr. Government's Exhibits filed at 286 . Defendant detained. (Court Reporter Shelly Semmler) (des) (Entered: 01/23/2015)

DATE	NO.	DOCKET TEXT
01/28/2015	366	JUDGMENT as to Defendant Levon Dean, Jr (2), Count(s) 1, 10sss, 11sss, 1s, 1ss, 2, 2s, 2ss, 3, 3s, 3ss, 4, 4s, 4ss, 4sss, 5, 5s, 5ss, 5sss, 6, 6s, 6ss, 7s, 7ss, 8, 9s, 9ss, Dismissed.; Count(s) 1sss, 2sss, 3sss, 6sss, 7sss, 9sss, Defendant is committed to the BOP for a total of: 400 months. This term of imprisonment consists of 40 months imposed on Counts 1, 2, 3 and 9 to be served concurrently with each other; 60 months imposed on Count 6, to be served consecutive to all other counts; and 300 months imposed on Count 7 of the Third Superseding Indictment, to be served consecutive to all other counts. Supervised Release: 3 years. This term of supervised release consists of a 3-year term imposed on each of Counts 1, 2, 3, 6, 7 and 9 of the Third Superseding Indictment, to be served concurrently. Special Assessment: $600.00. Signed by Judge Mark W Bennett on 1/28/15. (djs) (Entered: 01/28/2015)
01/28/2015	367	SEALED Statement of Reasons by USA, Pat Korth, US Probation, Levon Dean, Jr as to Defendant Levon Dean, Jr. (djs) (Entered: 01/28/2015)

DATE	NO.	DOCKET TEXT
01/30/2015	368	NOTICE of Appeal filed by Defendant Levon Dean Jr RE: 366 Judgment (Stoler, Alan) Modified text on 02/02/2015 (kfs) (Entered: 01/30/2015)
02/02/2015	369	NOA Supplement and Transmission of Notice of Appeal as to Defendant Levon Dean Jr to US Court of Appeals RE: 368 Notice of Appeal – Final Judgment: Case Number ddl 02/05/2015 (kfs) (Entered: 02/02/2015)
12/29/2015	396	OPINION of USCA as to Defendants Jamal Dean and Levon Dean, Jr as to 368 and 374 Notices of Appeal – Final Judgment: Affirming the judgments of the District Court in this well-tried, multiple-count, joint-defendant criminal case (Attachments: # 1 8CC Correspondence # 2 8CC Correspondence 2) (kfs) (Entered: 12/29/2015)
12/29/2015	398	JUDGMENT of USCA as to Defendant Levon Dean Jr RE: 368 Notice of Appeal – Final Judgment: Affirming the Judgment of the District Court (kfs) (Entered: 12/29/2015)

DATE	NO.	DOCKET TEXT
02/13/2016	400	ORDER of USCA as to Defendant Levon Dean Jr as to 368 Notice of Appeal – Final Judgment: The petition for rehearing en banc is denied: The petition for rehearing by the panel is also denied (kfs) (Entered: 02/13/2016)
02/26/2016	402	MANDATE of USCA as to Levon Dean, Jr re 368 Notice of Appeal – Final Judgment. In accordance with the 396 opinion and 398 judgment of 12/29/2015, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter. (src) (Entered: 02/26/2016)

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 15-1263
United States v. Levon Dean, Jr.

RELEVENT DOCKET ENTRIES

DATE	DOCKET TEXT
02/04/2015	CRIMINAL case docketed. [4241408] [15-1263] (JMH)
02/04/2015	Originating court document filed consisting of notice of appeal filed 1/30/15, Judgment filed 1/28/15, & docket entries, [4241418] [15-1263] (JMH)
02/04/2015	CLERK ORDER:Appointing Mr. Alan Stoler for Mr. Levon Dean, Jr. under the Criminal Justice Act. [4241436] [15-1263] (JMH)
04/23/2015	BRIEF FILED – APPELLANT BRIEF filed by Mr. Levon Dean, Jr.. w/service 04/20/2015; Length: 6227 words. 10 COPIES OF PAPER BRIEFS FROM Levon Dean Jr. due 04/28/2015 WITH certificate of service for paper briefs . Appellee brief due on 05/14/2015. [4268179] [15-1263] (MDS)
04/23/2015	ADDENDUM of APPELLANT FILED by Appellant Mr. Levon Dean, Jr., w/service 04/23/2015 [4268182] [15-1263] (MDS)

DATE	DOCKET TEXT
06/16/2015	BRIEF FILED – APPELLEE BRIEF filed by United States of America in 15-1263, 15-1349, w/service 06/15/2015, Length: 18,665 words. 10 COPIES OF PAPER BRIEFS FROM United States of America due 06/22/2015 WITH certificate of service for paper briefs . Levon Dean Jr. and Jamal Dean's reply brief due 06/23/2015. [4285777] [15-1263, 15-1349] (MDS)
06/24/2015	BRIEF FILED – APPELLANT REPLY BRIEF filed by Mr. Levon Dean, Jr. w/service 06/23/2015, Length: 3 pages 10 COPIES OF PAPER BRIEFS FROM Levon Dean Jr. due 06/29/2015 WITH certificate of service for paper briefs [4288171] [15-1263] (LAB)
12/29/2015	OPINION FILED – THE COURT: James B. Loken, C. Arlen Beam and Bobby E. Shepherd AUTHORING JUDGE:C. Arlen Beam (PUBLISHED) [4350326] [15-1263, 15-1349] (MDS)
12/29/2015	JUDGMENT FILED – The judgment of the Originating Court is AFFIRMED in accordance with the opinion.. JAMES B. LOKEN, C. ARLEN BEAM and BOBBY E. SHEPHERD Hrg Sep 2015 [4350348] [15-1263] (MDS)

DATE	DOCKET TEXT
01/12/2016	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Mr. Levon Dean, Jr. in 15-1263 w/service 01/12/2016 [4355512] [15-1263, 15-1349] (AS)
02/12/2016	JUDGE ORDER:Denying [4355512-2] petition for enbanc rehearing filed by Appellant Mr. Levon Dean, Jr.. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter. PUBLISHED ORDER. [4366699] [15-1263] (MDS)
02/25/2016	MANDATE ISSUED. [4371165] [15-1263] (MDS)
05/02/2016	MOTION to recall the mandate., filed by Appellant Mr. Levon Dean, Jr. w/service 05/02/2016. [4394531] [15-1263] (MDS)
05/12/2016	JUDGE ORDER:Denying [4394561-2] motion to recall the mandate filed by Appellant Mr. Levon Dean, Jr.. Hrg Sep 2015 [4398484] [15-1263] (MDS)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

LEVON DEAN, JR.,

Defendant.

No. CR13-4082

TRANSCRIPT OF
SENTENCING

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, January 23, 2015, commencing at 3:30 p.m.

APPEARANCES

For the Plaintiff: FORDE FAIRCHILD, ESQ.
Assistant United States Attorney
Ho-Chunk Centre – Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: ALAN G. STOLER, ESQ.
Suite 1004
1823 Harney Street
Omaha, NE 68102

Also present: Pat Korth, U.S. Probation
Todd Monney
Troy Hansen

Reported by: Shelly Semmler, RMR, CRR
320 Sixth Street
Sioux City, IA 51101
(712) 233-3846

[2] THE COURT: Thank you. Please be seated.

THE CLERK: This is Case Number 13CR4082, United States of America versus Levon Dean Junior. Counsel, please state your appearances.

MR. FAIRCHILD: Forde Fairchild for the United States.

MR. STOLER: Good afternoon, Your Honor. May it please the Court. Alan Stoler on behalf of Levon Dean.

THE COURT: Good afternoon, Mr. Stoler. Mr. Stoler, have you had a full, fair, and complete opportunity to review the presentence report with Mr. Dean?

MR. STOLER: I have, Your Honor.

THE COURT: And in this case probation scored it as a total offense level 25, criminal history category 4. Count 1 carries a 0- to 20-year sentence. Count 6 carries 5-year consecutive to all other counts; Count 7, 25 years consecutive to all other counts; Count 9, 0 to 10 years. Counts 1 through 3, excuse me, carry 0 to 20. And the advisory guideline range is 84 to 105 months. My understanding is you don't actually object to those calculations, or do you?

MR. STOLER: The – – those I do not object to, no. The presentence report that I had had adjusted offense level of 28, Your Honor.

THE COURT: Oh. Well – – yep, that's right. Let me just – – it's – – I've had a difficult day. You have an objection to the carjacking counts; correct?

[3] MR. STOLER: The carjackings and then the loss on the one vehicle.

THE COURT: Yeah. Well, they kind of go together; right?

MR. STOLER: Yeah.

THE COURT: Yeah. That's right. So it'd be a 28. If I sustain those objections, it'd be a 25.

MR. STOLER: 25.

THE COURT: Yes.

MR. STOLER: And I don't have objection to that.

THE COURT: Right, right. Does the government – – what's the government's position with regard to his objections to the carjacking enhancement and the $10,000 enhancement? If I find no carjacking, that enhancement goes out.

MR. FAIRCHILD: I think probation is correct, but that's the extent of the record I'll make.

THE COURT: Do you want to have any argument on it?

MR. STOLER: No, Your Honor.

MR. FAIRCHILD: No, Your Honor.

THE COURT: Probation is correct in the sense that I have discretion to consider acquitted conduct.

MR. FAIRCHILD: Exactly right.

THE COURT: Yeah. And I do have discretion to consider acquitted conduct, and I've exercised that discretion historically not to enhance people's sentence based on acquitted [4] conduct. And so I'm going to sustain the defense objections. And I think that brings us to a 25, criminal history category 4.

What's the government's sentencing position?

MR. FAIRCHILD: The government makes no specific recommendation. I disagree with Mr. Stoler's reasons for variance. I agree with probation's discussion of the guidelines but make no specific recommendation.

This is a case where when he was willing to plead I thought 13 years was within the range of reasonableness. He, of course, went to trial. We found out more bad stuff about him during trial, but there's still a broad range of reasonableness. I think the guidelines are correctly scored. I'm resisting a departure. I'm resisting a variance, but I think the Court has a lot of discretion here to fashion a sentence.

THE COURT: Why don't we hear your variance argument.

MR. STOLER: Your Honor, obviously the Court knows this case, and just with the sentencing of the brother, Jamal Dean, I'm submitting to the Court that looking at the total picture, looking at the 3553 factors, determining what is an appropriate sentence, that sentencing somebody to a constitutionally mandated 30-year sentence is more than sufficient to accomplish the goals of sentencing and to account for the criminal conduct in this case.

In looking at Levon Dean, the individual, looking at his involvement, obviously he was wrong to be involved. I don't [5] think he was the main culprit, but that doesn't excuse his conduct, and I don't mean by anything I'm saying to excuse that. He obviously had to have a conception of what activities his brother was going to undertake and had undertaken, at least by the time of the -- – for sure by the time of the second robbery, and I recognize that.

But looking at his age and his background and but for having been convicted of aiding and abetting on two separate guns on two separate occasions, we'd be looking at a -- I'd be arguing for a much less sentence than what I'm urging the Court to impose in this case.

But in considering that a sentence of 360 months is mandatory, I would submit to the Court that any sentence you impose on the crimes other than the gun crimes be as little as 1 day and then make the 30 years consecutive to that 1 day.

I would submit to the Court that that should be more than sufficient to accomplish the goals as I've indicated and especially a sentence that's not greater than necessary based upon Levon Dean's involvement in these crimes, Your Honor.

THE COURT: He does have ten criminal convictions that are unscored by my count.

MR. STOLER: I believe a lot – – most, if not all, those points relate to either shopliftings or disturb – – excuse me, disturbing the peaces or possession of marijuana. I think that only four counted under the criminal history category of [6] those – –

THE COURT: Right.

MR. STOLER: – – those things. I think the nature and types of those types of crimes would score only in the one-point category so of lesser – – lesser-type crimes. I recognize – –

THE COURT: He has very little history of violence.

MR. STOLER: He doesn't. I mean, that's correct.

THE COURT: Unlike his brother. I mean, they're very, very different – – they score pretty much the same, but they're very, very different criminal histories.

Have you run across this case? It seems to me several years ago I got reversed for saying that the stacking mandatory minimums like in this case which total

30 years – – I don't remember what they were in that other case – – were sufficient but not greater than necessary and I gave zero on the remaining counts, and the circuit said you have to – – reversed me because they said, you know, they have to be consecutive and you can't be consecutive to nothing.

MR. STOLER: That's why I asked for one day, Your Honor.

THE COURT: Do you recall that case or . . .

MR. STOLER: I don't.

THE COURT: Yeah.

MR. STOLER: But I've had a similar situation in another case in Nebraska that that issue came up as to [7] sentencing in that regard.

THE COURT: So what are the reasons? I mean, going from 84 months down to 1 day is an extraordinary variance.

MR. STOLER: It's an extraordinary variance if we're looking at – – it's not an extraordinary variance if we're looking at the total sentence.

THE COURT: I agree with you, but I think it's impermissible to do that. No, I totally agree with you.

MR. STOLER: Because the ultimate sentence is what we're considering under the 3553 factors. And when you're calculating the total sentence that encompasses a sentence of a mandatory 360 months,

there wouldn't be a need for anything further than that to achieve the goals of sentencing. So the variance for -- I guess the variance would count toward the whole picture is how I would argue that to you, Your Honor.

THE COURT: Does the government think a sentence of 360 months and 1 day is sufficient but not greater than necessary to achieve all of the sentencing purposes in this case?

MR. FAIRCHILD: 360? So the mandatory --

THE COURT: Well, that's the 30 years; right?

MR. FAIRCHILD: The 30 years plus a day?

THE COURT: Yeah.

MR. FAIRCHILD: Is that sufficient but not greater than necessary?

[8] THE COURT: Is that sufficient but not greater than necessary to achieve all of the sentencing purposes?

MR. FAIRCHILD: There is a range of reasonableness. That might be -- that might be reasonable. The defendant's criminal history and conduct I think militate against that, but it's -- I'm not willing to concede it, but it may very well be.

THE COURT: How do you think I'm supposed to look at it? Do you think I'm supposed to look at the overall sentence?

MR. FAIRCHILD: No, I don't think so, not when we have 924(c)'s. I think that's Congress's intent that armed conduct is punished additionally and separately. So I think in the case of 924(c)'s, they do want you to look at it separately. And when you're then talking about variances, I think you are – – you should look at the guideline range independent of the congressional additional punishment.

THE COURT: So I really have to look at this if he was convicted only on Counts 1 through 3 would I vary down to 1 day.

MR. FAIRCHILD: I think that's right, but I'm not confident in that. I think that's right, but I'm not confident in that. Once again, I'm not giving you good advice, Your Honor, and I'm sorry.

THE COURT: In terms of Counts 1, 2, and 3, how do you look at the relative culpability of each of the defendants, the Dean brother defendants?

MR. FAIRCHILD: Yes, sir. Levon Dean followed his [9] brother into – – repeatedly throughout his life but in this case two very violent instances. Levon Dean was appropriately held responsible for that under aider and abettor.

But Levon Dean is not the – – is not as culpable in this case as Mr. Jamal Dean is. Levon Dean did not have the weapons during either of the offenses, though he absolutely was part of a team in full knowing. And – – but he didn't hit J.R. He didn't hit C.B. He did have the gun when Hope Marsh was threatened, and he hit

her and said follow her (sic). But there we even have a literal case of him following his brother.

So the relative culpability is very distinctly Mr. Jamal Dean is far more culpable for this crime. He's far more dangerous. Levon Dean is a follower as evidenced in this crime spree.

And I'm not shrinking from, you know, Mr. Levon Dean's a dangerous person, but relative culpability, Jamal Dean's far, far more culpable, sir.

THE COURT: Mr. Stoler, you think I can look at it totally separately, I mean, and just say – – I mean, I think I'm required to look at it separately. And, you know, there's no way I would – – if I was just looking at the conduct in Counts 1 through 3, I might do a variance, but I wouldn't vary down to one day, and I don't think there's a judge in the country that would.

MR. STOLER: I accept that, but I don't agree with the [10] concept that you don't look at the total – – the big picture of what – – the sentence that you're imposing because ultimately that's what you're doing. You're imposing a sentence taking into account the guidelines and taking in account what Congress has mandated as to a mandatory sentence and determining all of that combined what is the appropriate sentence to impose on Mr. Dean.

THE COURT: Do you have a case that actually says that?

MR. STOLER: I'll be honest. I haven't researched it from that standpoint. I've researched it

from the standpoint of considering the variance and how the ultimate determination of the factors we look at comes into play, and one that keeps coming at to me is a sentence that's no greater than necessary. And the whole sentence is what we're looking at when we're making that determination. So I have quarrel with parsing them out because we're parsing out 30 years and ignoring it. That doesn't make any sense.

MR. FAIRCHILD: You know, hearing – –

THE COURT: But it may be congressional's will even if it doesn't make sense to you.

Anything else either lawyer wants to add – –

MR. FAIRCHILD: No. Thank you, Your Honor.

THE COURT: – – on the appropriate – – anything else on the appropriate sentence?

[11] MR. STOLER: No, Your Honor. I'll submit the matter to the Court.

THE COURT: Okay. Anything else I need to do before – – now, you objected to the offense conduct statement, but do I need to rule on those objections?

MR. STOLER: I don't believe so because I've accepted the guideline determinations.

THE COURT: Yes, right.

MR. STOLER: I just did that, Your Honor, I – – that was probably my fault. When it read to me that – – you saw the trial, and I know that you saw the trial.

THE COURT: Right.

MR. STOLER: I don't need to argue those things I argued at trial again, and I assume by objecting to what I did object to that that would encompass that so . . .

THE COURT: Mr. Dean, you have the right to say anything to me you want to. You don't have to say anything. You have a right to remain silent. If you exercise your right to remain silent, I will not hold it against you in any way. But if you'd like to say something, I'd be happy to hear from you. Is there anything you'd like to say?

THE DEFENDANT: I don't really want to make you any madder. I don't want to say nothing.

THE COURT: Okay. You don't want to say anything?

THE DEFENDANT: Yeah.

[12] THE COURT: Okay. That's fine. Thank you.

Okay. In examining the Title 18, 3553(a) factors, I am going to do a variance, and I'm going to vary down from 84 months down to 40 months, but I'm going to add to that because I'm going to give you a chance to appeal it because if I could go down -- I don't think I have discretion to go down to one day, but I'm going to make a record on that so you can appeal it. And if it comes back, then I'll go down to one day. I just -- this is one of those rare cases where I don't think I have

discretion to do what you want me to do, and that may be – – I may be misreading the law or misunderstanding it, and I recognize I may be doing that. So I'm going to try and make a very thorough record on this.

So I'm varying from 84 months down to 40 months because I think even though Levon was the older brother, I actually thought he was the younger brother based on what I heard in trial. And I might not have remembered if they testified about ages. To my way of thinking he was clearly the follower.

While he has a fairly extensive criminal history, it's over relatively minor things. Does not really have any significant history of any violence. And he wasn't the weapons guy, and he wasn't kind of leading the charge. He was much more of a follower. So those are the reasons why I'm varying down to 40 months.

[13] And it's my view that I have to look at it separately. If I could look at a combined package, I totally agree with you, Mr. Stoler, that 360 months plus 1 day on Counts 1 through 3 is more than suff – – not just sufficient and not greater than necessary. In my view it's more than sufficient for a sentence in this case.

But whether I'm operating under a misguided view of the law or whether it's an accurate view of the law, I don't think I can look at it that way. But if I could, I would agree with your argument, and I would sentence to the two mandatory minimums which total 360 months and then give 1 additional day.

But because I don't think I have discretion to do that – – and that's – – if I'm wrong about that, that's reversible error automatically because I'm saying I don't think I have the discretion to go down that low because I don't think I can look at the overall sentence. And I think we all agree that nobody on Counts 1 through 3 would actually vary down to 1 day if that was standing alone.

So I am going to impose a sentence of 400 months, and that would be based on 40 months on Counts 1 through 3, 40 months on Count 9 all to run concurrently with each other, and then the consecutive 25 years on Count 7 and 5 years on Count 5 to run consecutive to each other and consecutive to the other counts. And I believe that totals 400 months. Is that correct?

MR. STOLER: That's correct.

[14] THE COURT: So it's my judgment that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a total term of 400 months. Is there a facility you'd like me to recommend?

MR. STOLER: Your Honor, I don't believe he would qualify for a medium based upon that sentence, so it would have to be a USP. I would ask for it as close to this area so family can visit with him.

THE COURT: Okay. And I believe that would be Leavenworth.

MR. STOLER: Be Leavenworth, yeah.

THE COURT: So I'll recommend Leavenworth or another facility consistent with Mr. Levon Dean's security and custody classification as close to Sioux City, Iowa, as possible. I am going to recommend the 500-hour residential drug treatment program.

Upon release from imprisonment, you'll be placed on supervised release on all counts for three years to run concurrently.

While you're on supervised release, you'll have standard conditions contained in your judgment. You'll also have some special conditions.

You can't violate any state, local, or federal law. You can't possess any illegal drugs. You can't possess firearms, ammunition, or other destructive device or dangerous [15] weapons. You'll successfully participate in the testing and treatment for substance abuse. While you're on supervised release, you're not allowed to go to bars or taverns or other establishments whose primary source of income is derived from the sale of alcohol.

You'll also participate in any mental health treatment and evaluation recommended by the U.S. Probation Office including taking any authorized -- duly legally authorized medications.

You'll need to seek regular employment and attend any employment workshops. And until you obtain full-time employment, you may be required to perform up to 20 hours of community service per week.

You won't be allowed to associate with any gang members, prospects, or associate members or wear any gang clothing or insignia. You'll not have any contact while you're in prison or on supervised release with the victims set forth in paragraph 10. You'll also be subject to the standard search condition which means United States probation officers can search your person, anyplace you live, any automobile, motor vehicle, motorcycle, et cetera, all your personal property including any cellphones, smart phones, cameras, electronic storage devices, iPads, computer, thumb drives, flash drives, et cetera.

You don't have the ability to pay a fine, so the fine [16] is waived. There's a hundred-dollar special assessment on each of the six counts due and owing. You can pay that pursuant to the Bureau of Prisons inmate financial responsibility program. You're remanded to the custody of the United States marshal to serve this sentence.

You have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a written notice of appeal no later than 14 days from the date your judgment is filed. If you can't afford to pay for the costs of an appeal or pay for a lawyer on appeal, those costs will be paid on your behalf.

I'd ask the U.S. marshals to accommodate a family visitation.

Mr. Stoler, anything else?

MR. STOLER: No, Your Honor.

THE COURT: Okay. Thank you for your representation.

And anything else, Mr. Fairchild?

MR. FAIRCHILD: Since this will be appealed, just for the record, government objects to the variance and the extent of the variance in case I wasn't sufficiently clear. Thank you.

THE COURT: Okay. Thank you. Anything else from anybody?

Okay. Good luck to you, Mr. Dean. Thank you. We'll be in recess.

(The foregoing sentencing was concluded at 3:54 p.m.)

[17] CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/Shelly Semmler — 2-9-15
Shelly Semmler, RMR, CRR — Date

United States District Court
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	Case Number: CR 13-4082-2-MWB
LEVON DEAN, JR.	USM Number: 13171-029
	Alan G. Stoler Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) 1, 2, 3, 6, 7, and 9 of the Third Superseding Indictment filed on April 16, 2014 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951	Conspiracy to Interfere with Commerce by Robbery	04/24/2013	1
18 U.S.C. §§ 1951 and 2	Interference with Commerce by Robbery	04/15/2013	2
18 U.S.C. §§ 1951 and 2	Interference with Commerce by Robbery	04/24/2013	3

Additional Counts on Following Page

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) 4, 5, and 10 of the Third Superseding Indictment

■ Count 11 of the Third Superseding Indictment are dismissed on the motion of the United States.

(For Jury Trial purposes Count 10 was changed to Count 9 and Count 11 was changed to Count 10.)

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in economic circumstances.

January 23, 2015
Date of Imposition of Judgment

Mark W. Bennett
Signature of Judicial Officer

Mark W. Bennett
U.S. District Court Judge
Name and Title of Judicial Officer

1.28.15
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(C)(i), and 2	Possession of a Firearm in Furtherance of a Crime of Violence	04/15/2013	6
18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(C)(i), and 2	Possession of a Firearm in Furtherance of a Crime of Violence	04/24/2013	7
18 U.S.C. §§ 922(g)(1), 922(g)(3), and 924(a)(2)	Felon in Possession of a Firearm	04/29/2013	9

(Reflected as Count 8 for Jury Trial purposes)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 400 months. This term of imprisonment consists of 40 months imposed on Counts 1, 2, 3, and 9 to be served concurrently with each other; 60 months imposed on Count 6, to be served consecutive to all other counts; and 300 months imposed on Count 7 of the Third Superseding Indictment, to be served consecutive to all other counts.

■ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to USP Leavenworth, Kansas; or to a Bureau of Prisons facility as close to Sioux City, Iowa, as possible, commensurate with the defendant's security and custody classification needs

That the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years. This term of supervised release consists of a 3-year term imposed on each of Counts 1, 2, 3, 6, 7, and 9 of the Third Superseding Indictment, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant

shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the U.S. Probation Office:

1) The defendant must participate in and successfully complete a program of testing and treatment for substance abuse.

2) The defendant must not use alcohol nor enter bars, taverns, or other establishments whose primary

source of income is derived from the sale of alcohol.

3) The defendant must participate in a mental health evaluation and/or treatment program. The defendant must take all medications prescribed to the defendant by a licensed psychiatrist or physician.

4) If not employed at a regular lawful occupation, as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.

5) The defendant must not knowingly associate with any member, prospect, or associate member of any gang without the prior approval of the United States Probation Office. If the defendant is found to be in the company of such individuals while wearing the clothing, colors, or insignia of a gang, the Court will presume that this association was for the purpose of participating in gang activities.

6) The defendant must not have contact during the defendant's term of supervision with the victims set forth in paragraph 10 of the presentence report, in person or by a third party. This includes

no direct or indirect contact by telephone, mail, email, or by any other means.

7) The defendant must submit to a search of the defendant's person, residence, adjacent structures, office or vehicle, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant must warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the United States Marshals Service.

Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant	Date
U.S. Probation Officers/ Designated Witness	Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 600	$ 0	$ 0

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(l), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth

day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ■ Lump sum payment of $ 600 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a

period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Codefendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals
for the Eighth Circuit

No. 15-1263

United States of America

Plaintiff-Appellee

v.

Levon Dean, Jr.

Defendant-Appellant

No.15-1349

United States of America

Plaintiff-Appellee

v.

Jamal Dean

Defendant-Appellant

Appeals from the United States District Court
for the Northern District of Iowa – Sioux City

Submitted: September 24, 2015
Filed: December 29, 2015

Before LOKEN, BEAM, and SHEPHERD, Circuit Judges.

BEAM, Circuit Judge.

Levon and Jamal Dean, brothers, appeal their convictions and sentences arising out of armed robberies of two Sioux City area drug dealers in violation of the Hobbs Act,[1] 18 U.S.C. § 1951, and related counts. We affirm the district court.[2]

I. BACKGROUND

Viewed in the light most favorable to the prosecution, the trial evidence established the following facts. On April 15, 2013, Jessica Cabbell visited her friend

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[1] The Hobbs Act proscribes robbery that affects interstate commerce, making what would often be a state crime, a federal crime. *United States v. Dobbs*, 449 F.3d 904, 911 (8th Cir. 2006). The Supreme Court has granted certiorari in a case that may ultimately limit the reach of the Hobbs Act in cases involving robbery of individual drug dealers. *See United States v. Taylor*, 754 F.3d 217 (4th Cir. 2014), *cert. granted*, 136 S. Ct. 26 (Oct. 1, 2015) (granting certiorari on the issue of whether the government can meet the interstate commerce element by relying exclusively on evidence that the robbery of a drug dealer is an inherent economic enterprise that satisfies the interstate commerce element of the offense). However, unlike the Fourth Circuit, our precedent requires the government to actually prove that robbery of a drug dealer is linked to interstate commerce, *compare Taylor*, 754 F.3d at 222-23, *with United States v. McCraney*, 612 F.3d 1057, 1064-65 (8th Cir. 2010), so we doubt that the ultimate outcome in *Taylor* will affect the instant case.

[2] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa.

Reggie Galvin in South Sioux City, Nebraska. Sarah Berg was also at Galvin's, and Cabbell, a prostitute, told the other two she was scheduled to have a "date" with J.R., who was a known methamphetamine and marijuana dealer from LeMars, Iowa, later that night. Both women had previously dealt with J.R. as a drug dealer and had exchanged sex for drugs with him. However, J.R. apparently owed Berg money based upon the previous dealings, or according to Berg, had taken $400 of her money. Berg expressed a desire to collect that money. Berg and Galvin decided that in order to collect the money J.R. owed, they would need "muscle." It was agreed that the Dean brothers would provide the muscle.

The Deans arrived at Galvin's house, and then Berg, Cabbell, and the Deans proceeded to the Palmer House Motel in Sioux City, Iowa, where Cabbell's "date" with J.R. was to take place. Cabbell had informed J.R. that another woman would join them at some point, but did not tell J.R. that it would be Berg. Cabbell arrived alone at J.R.'s room, and she and J.R. smoked methamphetamine together. A bit later, Berg and the Deans arrived. Berg immediately confronted J.R. about the stolen money, while Jamal pulled a gun on J.R. and demanded the money in question. Meanwhile, Levon ransacked the room looking for money and drugs. Cabbell left the scene because she alleges she did not know a firearm would be involved. When J.R. reached for his car keys, Jamal hit J.R. on the head with the gun, and Berg took J.R.'s car keys, cell phone, and a pipe containing methamphetamine. Jamal

threatened to kill J.R. if he called police. With Berg driving, Berg and the Deans drove away in J.R.'s car. Despite Jamal's warning, J.R. used the motel manager's cell phone to call 911 and report the robbery. Cabbell, Berg, and the Deans again met up at Galvin's house in Nebraska after the robbery and lamented the lack of spoils from the robbery.

On April 24, 2013, Levon and Jamal robbed another methamphetamine dealer (C.B.) in the dealer's home, at gunpoint. Jamal hit C.B. with his gun, and the Deans stole approximately $300 in cash, about 20 grams of methamphetamine, a digital scale, electronic and computer equipment, and old cell phones. The Deans ordered Hope Marsh, who was living there, to pack her stuff because she was to come and live with them. She apparently complied, and the trio drove away in C.B.'s two cars. Sioux City police issued arrest warrants for the Deans, and Levon was arrested in Sioux City pursuant to the warrant. On April 29, police attempted to pull over a vehicle Jamal was riding in during a traffic stop. Because he knew about the warrant, Jamal instructed the car's driver to try to evade police. When the driver eventually did stop the car, Jamal jumped out and shot his rifle in an attempt to evade capture. Jamal eventually disposed of the loaded weapon in a nearby alley trash dumpster and escaped from authorities. He was eventually arrested in Texas in May 2013.

In April 2014, an eleven count, Third Superseding Indictment was returned charging Jamal, Levon, and Berg with: conspiracy to commit robbery under the

Hobbs Act, in violation of 18 U.S.C. § 1951 (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. §§ 2 and 1951 (Counts 2 and 3); carjacking, in violation of 18 U.S.C. §§ 2 and 2119(1) (Counts 4 and 5); possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)(ii), and 924(c)(1)(C)(i) (Counts 6 and 7); being felons in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(3), and 924(a)(2) (Counts 8 and 9); and interstate transportation of a stolen vehicle, in violation of 18 U.S.C. §§ 2 and 2312 (Counts 10 and 11).[3] All three defendants filed motions to sever in which each argued that Berg's trial should be severed and tried separately. A magistrate judge[4] severed Berg's trial from the Deans', and Berg ultimately pleaded guilty to several counts and testified at trial against the Deans.

On August 29, 2014, the jury returned a verdict finding Jamal guilty on the offenses charged in Counts 1, 2, 3, 4, 6, 7, and 8, and acquitted him of the charges in Counts 5 and 9. The jury found Levon guilty of the charges in Counts 1, 2, 3, and 8, and acquitted him of the charges in Counts 4, 5, and 9. In addition, Levon was acquitted of the primary charges in Counts 6 and 7, but was found guilty on each count of the lesser included offense of possessing a firearm in furtherance of a crime of violence. The district court denied the

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[3] The original Count 8 was severed prior to trial, and the remaining counts were renumbered accordingly. Count 11, which was by then Count 10, was dismissed prior to reaching the jury.

[4] The Honorable Leonard T. Strand, United States Magistrate Judge for the Northern District of Iowa.

motions for judgment of acquittal prior to the jury's verdict, and the post-trial motions for judgment of acquittal and new trial. Jamal's sentencing Guidelines range was 140-175 months in addition to mandatory consecutive minimums of seven and twenty-five years on the 18 U.S.C. § 924(c) counts. *See* 18 U.S.C. § 924(c)(1)(D)(ii) (mandatory consecutive sentence). However, the district court varied upwards to sentence Jamal to life in prison. Levon was sentenced to 400 months, which included a 360-month mandatory minimum consecutive sentence for the § 924(c) offenses. Without the mandatory minimums, Levon's Guidelines range was 84-105 months. Thus, the district court gave Levon a substantial downward variance of 40 months for the Guidelines sentence, which was by statutory directive consecutive to the 360-month mandatory sentence.

On appeal, Levon challenges the sufficiency of the evidence to establish a nexus to interstate commerce required for the Hobbs Act robberies; the sufficiency of the evidence for his firearm convictions; and the reasonableness of his sentence. Jamal argues the court erred in refusing to exclude in limine any reference to gangs or gang affiliation; there was insufficient evidence of the nexus to interstate commerce for the Hobbs Act robberies; the district court erred in refusing to give supplemental jury instructions regarding the nexus to interstate commerce; the government proved multiple, as opposed to a single, conspiracy and the district court's failure to give a proffered jury instruction in that regard; there was insufficient

evidence to convict him of carjacking; the district court should have granted a new trial in the interests of justice; and his life sentence, imposed after the district court heard hearsay testimony at the sentencing hearing, was procedurally flawed and violates due process.

II. DISCUSSION

A judgment of acquittal is only appropriate if the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). A guilty verdict should be overturned only if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Sanchez*, 789 F.3d 827, 834 (8th Cir. 2015). Like the district court, we view the evidence in the light most favorable to the guilty verdict, and grant all reasonable inferences that are supported by that evidence. *Id.*

A. Hobbs Act

Both defendants assert that there was insufficient evidence linking the robbery of J.R., C.B., or both to interstate commerce to support a Hobbs Act violation. The district court denied this point in the post-trial motions, noting that our precedent quite liberally construes the nexus-to-commerce requirement in the Hobbs Act. Indeed, where a federal statute has an express jurisdictional nexus-to-commerce requirement, the crime's actual connection to interstate commerce

may be quite small. *United States v. McAdory*, 501 F.3d 868, 871 (8th Cir. 2007).

The Deans reference a three-part test (originating in the Fifth Circuit, but cited with approval in *United States v. Quigley*, 53 F.3d 909, 910-911 (8th Cir. 1995)) to determine whether there is an adequate nexus to interstate commerce in a Hobbs Act case involving robbery of a drug dealer: (1) whether the robbery affected the victim's ability to buy and sell drugs in interstate commerce; (2) whether there is a likelihood that as a result of the robbery, the victim would have to deplete the assets of an entity engaged in commerce; and (3) whether the number of individuals victimized or the sum at stake is so large that there will be a cumulative effect on interstate commerce. *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994). As we understand this test, only one of these three prongs must be met in order to establish the interstate commerce nexus. Here, the first prong is met for both robberies. There is ample evidence that C.B. was robbed of an amount of methamphetamine (20 grams) that could have and would have been distributed by C.B. The evidence with regard to J.R. is less ample, but sufficient for the jury to convict on this count. The evidence indicates that J.R. was hoping to exchange methamphetamine for sex with Cabbell, and the interstate encounter was interrupted by Berg and the Deans before the transaction was complete.

Further, under our precedent, because the Deans robbed drug dealers, the offense arises under the Hobbs Act so long as there is any evidence regarding

the interstate character of the drug dealing – i.e., that the drugs came from a different state than the dealings, that the dealer had customers in different states, or both. *United States v. McCraney*, 612 F.3d 1057, 1064-65 (8th Cir. 2010). And, because the transactions at issue took place in the Sioux City area, a metropolitan area reasonably encompassing three different states, the interstate nexus requirement was easily met in this case. Indeed, the evidence at trial indicated that C.B. received his methamphetamine from Nebraska and sold it in Iowa, South Dakota, and Nebraska. J.R. testified that he sold methamphetamine in South Dakota and Iowa.

The Deans argue that *Quigley* mandates a different result. In that case, we held that there was an insufficient nexus to interstate commerce when defendants robbed two intoxicated Native Americans of .80 cents and a pouch of chewing tobacco on a road between Valentine, Nebraska, and Crookston, Nebraska, where the victims were en route to purchase alcohol. 53 F.3d at 910-11. We rejected the government's argument that the robbery affected interstate commerce by preventing the victims from reaching the store to make their alcohol purchase. *Id.* at 911. For the reasons stated above, the current factual scenario is much more similar to *McCraney* than *Quigley* and we affirm the Deans' Hobbs Act convictions.

B. Conspiracy

Jamal's next sufficiency argument is that instead of proving a single conspiracy, the evidence instead showed that there were multiple conspiracies – one to rob J.R. and another one to rob C.B. – resulting in a variance between the indictment and proof, and requiring a judgment of acquittal. Whether one conspiracy or multiple conspiracies have been proved is determined by the totality of the circumstances. *United States v. Slagg*, 651 F.3d 832, 842 (8th Cir. 2011). And, if a variance has occurred, reversal is warranted only if the variance infringed upon a substantial right. *Id.*

Jamal's argument that the robberies of J.R. and C.B. were not related enough to support a single conspiracy count is well taken. J.R. was robbed to pay back a debt allegedly owed to Berg, and the robbery of C.B. happened nine days later. However, as the government points out, the two robberies were similar in style, means, and motive, and both were carried out by the Deans. Jamal cites *United States v. Delgado*, 653 F.3d 729, 736 (8th Cir. 2011), in support of his argument that multiple conspiracies (as opposed to a single conspiracy) were proven in the instant case. In *Delgado*, the government was able to establish that a series of separate crimes was all part of one overarching agreement to conspire. It did so based upon evidence of significant overlap and connection between the conspirators in a large scale cocaine distribution scheme. *Id.* Jamal claims that such evidence is lacking in this case. Given our standard of review of the jury's verdict, we reject Jamal's arguments. The circumstantial

evidence admitted at trial – the robberies were both committed by the brothers acting in concert; both targets were low-level methamphetamine dealers; both robberies took place in Sioux City; and the robberies occurred during a relatively short two-week time span – is enough to sustain the jury's verdict. And, even if there was a variance, such a variance was harmless error because it did not infringe on Jamal's substantial rights. The evidence clearly showed Jamal participated in both robberies (and thereby both conspiracies) as the gunman. Because Jamal would have been guilty of both conspiracies, his substantial rights were not violated if two conspiracies were proven instead of one. *Id.*

Relatedly, Jamal argues there was no proof of an agreement regarding the alleged object of the conspiracy – to rob drug traffickers. Jamal argues that the reason the two men were robbed had very little to do with the fact that they were drug traffickers, and there was certainly no agreement to rob drug traffickers. The government asserts that the fact that Jamal chose known drug traffickers as the two victims of his robberies allowed the jury to infer that robbing drug dealers was the object of the conspiracy. Again, given our standard of review of the jury's verdict in a motion for judgment of acquittal, we reject Jamal's sufficiency arguments in this regard. Jamal argues that J.R. and C.B. were not big time drug dealers, and arguably J.R. did not come to Sioux City for the purpose of selling drugs, but those were arguments he also unsuccessfully made to the jury. In fact, the evidence showed that J.R. had in the past, and was that day again hoping to

barter drugs for sex when contacted by Cabbell. Accordingly, there was sufficient evidence that J.R. was poised to exchange drugs for sex with Cabbell and that the Deans' agreement to rob him significantly thwarted that plan. Further, the 20 grams of methamphetamine taken from C.B. rather easily allowed the jury to infer an agreement to rob a drug dealer. Accordingly, Jamal's object-of-the-conspiracy argument is without merit.

C. Carjacking

Jamal next argues there was insufficient evidence to convict him of carjacking when he stole J.R.'s[5] vehicle following the robbery. A conviction pursuant to 18 U.S.C. § 2119 requires the government to prove that the defendant took a motor vehicle "from the person or presence of another" and "with the intent to cause death or serious bodily harm." Jamal argues there was no evidence that Jamal intended J.R. to suffer serious bodily harm as a result of the carjacking. The government responds that after Berg had taken J.R.'s car keys, Jamal's act of hitting J.R. in the head with the rifle and threatening to kill him if he called police satisfies the serious-bodily-injury element. We agree that there was evidence presented at trial of both the threat to J.R.'s life, in addition to the bloody wound, and later medical care following the blow to the head that would allow the jury to find this element of the offense. *See*

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[5] Jamal and Levon were both acquitted of carjacking in Count 5, which was the incident with regard to C.B.'s vehicles.

United States v. Waldman, 310 F.3d 1074, 1078 (8th Cir. 2002) (holding that evidence of threats to kill during a carjacking if the driver did not follow instructions was sufficient to satisfy the serious bodily injury element); *United States v. Garcia-Alvarez*, 541 F.3d 8, 16 (1st Cir. 2008) (holding that the wound that left victim bleeding and requiring medical care and surgery satisfied the serious bodily injury element). Jamal seems to argue that, given that he had a gun at the scene, he certainly could have caused a more serious injury than he did. However, the government is not required to prove that Jamal caused the most serious injury possible. Here there was sufficient evidence of a serious bodily injury to satisfy the statute.

Jamal further argues that the lack of proximity of J.R. to the car at the time of his injury precludes conviction under § 2119. And Jamal asserts that the stolen car was incidental to the robbery and not an object of it. However, the defendant unsuccessfully made similar arguments in *United States v. Casteel*, 663 F.3d 1013, 1019-20 (8th Cir. 2011) (holding that the elements of the "carjacking statute may be satisfied when the victim of the carjacking is inside a building and the stolen car is parked outside"),[6] and *Garcia*, 541 F.3d at 16 (holding that the carjacking statute does not require that the taking of a vehicle be the only or primary

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[6] In *Casteel*, the defendant challenged the "presence of another" portion of the statute, while Jamal purportedly challenges the "bodily injury" element. However, we understand Jamal's argument to be a hybrid of the two – Jamal contends both that the injury itself was not serious, and that J.R.'s distance from the car prevented the serious injury from being related to the car theft.

motive of the crime). Accordingly, we also deny Jamal's arguments in this regard. Because there was sufficient evidence that the injury to J.R. was indeed, serious, neither J.R.'s proximity (or lack thereof) to the vehicle itself nor the ultimate motive of the encounter with J.R. is dispositive.

D. Firearms Offenses

Levon argues there was insufficient evidence to convict him of possessing and aiding and abetting in the possession of a firearm. Levon contends that the verdict was contrary to the evidence at trial, which, he asserts showed that Jamal was the only one possessing or using the firearm during the robberies. In support, Levon cites *Rosemond v. United States*, 134 S. Ct. 1240, 1249-50 (2014) (holding that in order to be convicted of aiding and abetting in the possession of a firearm during another crime, the defendant must know beforehand that his confederate will carry a gun, and that once he did know, he did not walk away). Levon argues that he did not know beforehand that his brother Jamal would have a gun during the robberies and did not have the opportunity to walk away once he did know. After reviewing the trial transcript, we find Levon's arguments in this regard disingenuous. At least two witnesses described Jamal's "gun walk" – the way Jamal walked with a limp when hiding a gun in his pants. The jury could easily infer that if these witnesses knew how Jamal looked with a hidden gun, so too did Levon. The government further points out that Cabbell did exactly what Levon asserts he could not do

in order to avoid the firearm prosecution – once she realized Jamal had a gun, she left the April 15 robbery premises because she does not "rob people with guns." Finally, following the April 15 robbery, it was even more obvious that Levon knew about Jamal's gun during the April 24 robbery, and the evidence shows that at one point during the April 24 robbery, Levon actually held the firearm. Accordingly, this argument is without merit.

Jamal also argues the evidence is insufficient to convict him for possession of and brandishing a firearm in furtherance of a crime of violence. However, the evidence at trial clearly established he had a gun and used it during the robberies of J.R. and C.B. and during the carjacking. We understand Jamal's primary point on this issue to be that if we were to reverse the Hobbs Act and carjacking convictions, we would also need to vacate the firearms offenses that require predicate "crime of violence" offenses. Because we have not reversed Jamal's other convictions, his firearms arguments are without merit.

E. Pretrial and Trial Error

Jamal argues that the district court should have granted his motion in limine to exclude any evidence of his alleged gang affiliation, arguing that any mention of gangs was unduly prejudicial. *See United States v. Ford*, 761 F.3d 641, 649-50 (6th Cir.) (holding that gang affiliation evidence is inadmissible if there is no connection between the gang evidence and the charged

offense), *cert. denied*, 135 S. Ct. 771 (2014). The government counters that despite the district court's failure to exclude gang membership in limine, there was no mention of gangs at trial. Further, the district court's reasoning not to categorically exclude the evidence prior to trial – because it may have been necessary for context – was sound. *See United States v. Johnson*, 28 F.3d 1487, 1497 (8th Cir. 1994) (holding that evidence of gang association may be necessary to show the nature and extent of the association between defendants). We review the district court's admission or exclusion of evidence for an abuse of discretion. *United States v. Sewell*, 457 F.3d 841, 843 (8th Cir. 2006). Having carefully reviewed the trial transcript, we agree with the government's assertion that there was no evidence of gang affiliation at trial. There was extensive evidence of gang affiliation at Jamal's sentencing hearing. However, as we understand Jamal's argument, he is not challenging the specific content of the sentencing hearing testimony but instead the hearsay nature of it, a subject we will address below. Accordingly, this point is denied.

Jamal next makes several arguments regarding allegedly erroneous jury instructions. First, in relation to the previously discussed Hobbs Act argument, Jamal asserts that the district court erred in refusing to give his requested instruction that "interfering with commerce" is an element of the crime. However, Jamal requested this instruction for Count 1, which was the *conspiracy* to commit Hobbs Act robberies. The instruction as given read, "at some time during the period of

the conspiracy – that is, from a date unknown until about April 29, 2013 – in the Northern District of Iowa, two or more persons reached an agreement or understanding to commit robberies of drug traffickers." The government points out that the instruction adequately informed the jurors to find Jamal guilty if he agreed with another to commit robberies of drug traffickers. Indeed, longstanding Eighth Circuit precedent supports the government's interpretation. *See Nick v. United States*, 122 F.2d 660, 673 (8th Cir. 1941) (holding that government did not need to prove that defendants knew the effect of their conspiracy would be to affect interstate commerce; but rather that they agreed to do something, the natural effect of which was to affect interstate commerce). Further, the government points out that "interstate commerce" was defined in the jury instruction directly preceding the challenged instruction, and was specifically included as an element of the offense regarding Counts 2 and 3, the actual Hobbs Act counts. We review the district court's jury instructions for an abuse of discretion and will reverse only if the instruction did not fairly and adequately represent the evidence and law. *United States v. Manes*, 603 F.3d 451, 458 (8th Cir. 2010). Because the instruction fairly and adequately represented the evidence and the law, we deny this point.

Jamal also argues the district court erred in instructing the jury on possession, relating to his conviction on Count 8 for prohibited possession of a firearm and ammunition. Possession was defined in the instructions as follows: "A person possessed something if

all three of the following are true: the person knew about it, and the person had physical control over it or a vehicle in which it was concealed or transported, or the power, or ability, to control it, and the person had the intention to control it. . . ." Jamal claims the words "or transported" after the word "concealed" was inconsistent with constructive possession. The gist of Jamal's argument is that there may have been a firearm in the car that he did not know about and thereby would not have had constructive possession of it. This argument is without merit. The district court's instruction required the jury to find that Jamal had knowledge of any firearm, and indeed, the evidence supports the jury's finding. Jamal carried a firearm at all pertinent times in the underlying crime spree. Jamal used the firearm during a traffic stop on one occasion, and used it as a weapon to hit both J.R. and C.B. on the head at other times. Because the instruction fairly and adequately represented the evidence and the law, we reject this point.

Jamal's final complaint about the jury instructions is the district court's failure to give a multiple-conspiracy jury instruction. As recounted above, Jamal argues that the government proved two conspiracies, but only alleged one in the indictment. A single conspiracy is comprised of people sharing common objectives under one general agreement. *United States v. Benford*, 360 F.3d 913, 914 (8th Cir. 2004). As earlier noted, we found that there was sufficient evidence for the government to establish one single conspiracy. Accordingly, Jamal's lack of success on the merits of

the multiple- versus single-conspiracy claim precludes him from prevailing on his claim that the district court erred in refusing to give his "multiple conspiracies" jury instruction.

F. New Trial

Based upon many of the foregoing arguments, Jamal argues that the weight of the evidence preponderates sufficiently against the verdicts so that a serious miscarriage of justice will result unless a new trial is granted. Jamal focuses on the testimony of J.R. that he had told Cabbell prior to their April 15 encounter that he did not have any money to pay for sex, and therefore J.R.'s robbery did not affect interstate commerce. The standard for granting a motion for new trial is more lenient than for a judgment of acquittal; the court is allowed to vacate any judgment if the interests of justice so require. *United States v. Knight*, 800 F.3d 491, 504 (8th Cir. 2015). However, the decision to grant or deny a motion for a new trial based upon the weight of the evidence is within the sound discretion of the trial court. *Id.* The district court thoroughly reviewed Jamal's request for a new trial and determined that the interests of justice did not so require. Given that we were not persuaded by Jamal's earlier discussed Hobbs Act arguments, we find no abuse of discretion in the district court's decision to deny a new trial.

G. Sentencing

Jamal and Levon both appeal certain aspects of their sentences. We review the district court's sentencing factual findings, including relevant conduct, for clear error, and its construction and application of the Guidelines de novo. *United States v. Howard*, 759 F.3d 886, 889 (8th Cir. 2014). Further, the district court has broad discretion at sentencing concerning the kind and source of the information it receives. *United States v. Garcia*, 774 F.3d 472, 475 (8th Cir. 2014) (per curiam). Further, a sentencing proceeding does not carry the same evidentiary protections as a trial and the court may consider uncorroborated hearsay evidence if it has sufficient indicia of reliability. *Id.*

Jamal's calculated sentencing Guidelines range was 140-175 months on counts 1, 2, 3, 4, and 9, in addition to mandatory consecutive minimums of seven and twenty-five years on the 18 U.S.C. § 924(c) counts. The district court varied upwards and sentenced Jamal to life in prison, reasoning that due to a number of violent incidents, both in regards to the charged conduct, and previous uncharged conduct, the court needed to protect the public from Jamal. In so doing, the court heard testimony about these events from several individuals at the sentencing hearing, some of which constituted hearsay. Jamal contends that the district court procedurally erred in relying upon this hearsay testimony because there was not sufficient indicia of reliability to render this testimony reliable. The challenged testimony from three witnesses involved Jamal's alleged role in a 2012 incident wherein

he allegedly shot a member of a rival gang, J.E., ostensibly in retaliation for J.E. stabbing a member of Jamal's gang. Two of the challenged witnesses were police officers who were told by numerous people that Jamal had committed the shooting. The third witness was a paramour of J.E. She testified that when J.E. awoke from a coma, he told her that Jamal had shot him. Interestingly enough, J.E. testified at the sentencing hearing and alleged he "did not see" who shot him, nor did he recall the conversation with his girlfriend in the hospital. However, an overriding theme from numerous of the non-law-enforcement witnesses at the sentencing hearing was that they were there under subpoena and duress because they were members of various rival gangs in the Sioux City area. On the other side of the coin, numerous of these same witnesses were hoping to receive leniency in their various criminal sentences in return for government-favorable testimony. At bottom, given the tenor and tone of the sentencing hearing after thoroughly reviewing the transcript, we agree with the district court's finding that the paramour's detailed account of the events pre- and post-shooting have sufficient indicia of reliability such that the district court could rely upon it, despite the fact that her testimony identifying Jamal as the shooter was clearly hearsay.

Furthermore, the district court's overall sentencing decision to vary upwards to protect the public from Jamal was not substantively unreasonable. We "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*

v. United States, 552 U.S. 38, 51 (2007). "[I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* It was within the district court's considerable discretion to vary upwards and sentence Jamal to life in prison. The district court very thoughtfully considered Jamal's unusually active and violent criminal history for a defendant only twenty-three years old, and, it seems to us, rather reluctantly came to the conclusion that the only possible just sentence was life in prison. Accordingly, we affirm the district court's sentence.

Levon was subject to five-year and twenty-five-year mandatory sentences (360 months) for the 924(c) offenses. His Guidelines range was 84-105 months for the remaining counts. Levon requested that the district court sentence him to one day for the remaining counts, given the harshness of the 360-month mandatory sentences. The district court stated on the record that it would like to do just that, but felt it did not have the discretion to do so based upon our decision in *United States v. Hatcher*, 501 F.3d 931, 933-34 (8th Cir. 2007) (holding that a district court unreasonably varied downward in sentencing a defendant to one day for the crimes not subject to a mandatory minimum, solely because the mandatory sentence was 300 months). Levon argues that the district court erred when it ruled that it did not have discretion to impose a lower

Guidelines sentence based upon the harshness of the mandatory minimums. We see no meaningful difference between the situation in *Hatcher* and what Levon requested in this case. Accordingly, the district court correctly noted his inability to sentence Levon as requested. Thus, we find that the district court's 40-month sentence, to be served consecutively with the 360-month sentence, for a total sentence of 400 months, was substantively reasonable and not an abuse of the district court's discretion.

III. CONCLUSION

We affirm the judgments of the district court in this well-tried, multiple-count, joint-defendant criminal case.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-1263

United States of America

Plaintiff-Appellee

v.

Levon Dean, Jr.

Defendant-Appellant

Appeal from U.S. District Court for the
Northern District of Iowa – Sioux City
(5:13-cr-04082-MWB-2)

JUDGMENT

Before LOKEN, BEAM and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 29, 2015

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-1263

United States of America

Appellee

v.

Levon Dean, Jr.

Appellant

Appeal from U.S. District Court for the
Northern District of Iowa – Sioux City
(5:13-cr-04082-MWB-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

February 12, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
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October 28, 2016

Mr. Alan G. Stoler
1823 Harney Street
Suite 1004
Omaha, NE 68102

Re: Levon Dean, Jr.
v. United States
No. 15-9260

Dear Mr. Stoler:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

RECORD AND BRIEFS

No. 15-9260

Supreme Court, U.S.
FILED
DEC 16 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LEVON DEAN, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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December 16, 2016

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QUESTION PRESENTED

Whether *United States* v. *Hatcher* and related opinions from the U.S. Court of Appeals for the Eighth Circuit, which bar a district court from considering the consecutive mandatory minimum sentence required under 18 U.S.C. § 924(c) in determining the sentence for the underlying felony, are inconsistent with this Court's decision in *Pepper* v. *United States* and the Sentencing Reform Act, 18 U.S.C. §§ 3551, 3553, and 3661.

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The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Joint Appendix (J.A.) at J.A. 45-67. It is also available at 810 F.3d 521 (8th Cir. 2015). The sentencing transcript of the United States District Court for the Northern District of Iowa is reproduced at J.A. 14-30.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on December 29, 2015, see J.A. 68-69, and denied a petition for rehearing *en banc* on February 12, 2016, see J.A. 70. The petition for a writ of certiorari was filed on May 4, 2016, and granted on October 28, 2016. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3551, 3553(a), 3661, 3582, 3584, are included as an appendix to this brief. The mandatory consecutive sentence provisions of 18 U.S.C. § 924(c) and § 1028A are also included in the appendix.

STATEMENT OF THE CASE

The Sentencing Reform Act authorizes a district court, in determining the proper sentence for a crime-of-violence offense, to consider the plainly relevant fact that the defendant will also serve a lengthy mandatory consecutive sentence under 18 U.S.C. § 924(c). The Act's centerpiece, § 3553(a), instructs a district court to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing enumerated in that statute. Properly

implementing that command requires taking into account a vast range of information about the defendant, including the plainly relevant fact that he will also serve a lengthy mandatory minimum sentence.

That conclusion is bolstered by § 3661, which, as this Court has repeatedly underscored, grants district courts discretion to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *Pepper* v. *United States*, 562 U.S. 476, 489 (2011) (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)). The fact of a defendant's § 924(c) sentence is precisely the sort of information a district court may properly consider under this provision. Conversely, excluding that fact erects precisely the sort of "categorical bar" on certain information that this Court has repeatedly rejected. See *id.* at 491.

Nothing in § 924(c) is to the contrary. That provision merely imposes a mandatory minimum sentence on anyone who uses or carries a gun during a crime of violence. § 924(c)(1)(A). That sentence must be imposed consecutively "with any other term of imprisonment imposed on the [defendant], including any term of imprisonment imposed for the [underlying] crime of violence." § 924(c)(1)(D)(ii). It does *not* say that a district court must ignore the fact of the § 924(c) sentence in determining the sentence for the underlying offense. That silence is especially telling given Congress's decision to include such language in other statutes, *e.g.*, § 1028A, but not here. Section 924 therefore cannot be read to restrict the district courts' longstanding and broad sentencing discretion, as recognized and codified in §§ 3551, 3553 and 3661.

Factual Background

At issue in this case is Levon Dean, Jr.'s sentence for two robberies involving alleged drug dealing around Sioux City, Iowa. J.A. at 46–51. On April 15, 2013, Mr. Dean and his brother, Jamal Dean, were approached by two women, Sarah Berg and Jessica Cabbell, to provide the "muscle" to recover money from "J.R.," a drug user who owed Ms. Berg money. *Id.* at 46–47. Cabbell, a prostitute, had a "date" with J.R. and the group decided to go to the motel where the date was to take place. *Id.* at 47. At the motel, Berg confronted J.R. about the $400 debt, while Mr. Dean looked around for money and drugs. *Id.* Jamal, drew a firearm and hit J.R. on the head with it. *Id.* Berg took J.R.'s car keys, cell phone, and a pipe containing methamphetamine. *Id.* Subsequently, Berg and the Deans left the scene together. *Id.* at 48. On April 24, 2013, the Deans robbed a drug dealer. *Id.* Jamal, again hit the drug dealer with his gun and the two left with $300 in cash, 20 grams of methamphetamine, and some electronic equipment and old cell phones. *Id.*

Prosecution and Sentencing

In 2014, Mr. Dean and his brother were charged with conspiracy to commit robbery and robbery in violation of 18 U.S.C. §§ 2 and 1951 (Counts 1–3). *Id.* at 48-49. They were also charged with possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c), based on the presence of the guns at the robberies (Counts 6–7). *Id.* at 49. They were further charged with two counts of carjacking and two counts of being felons in possession of a firearm. *Id.* A jury returned verdicts of guilty for Mr. Dean on the conspiracy count, the robbery counts, and the two counts of possession of a firearm

in furtherance of a crime of violence. *Id.* The jury acquitted Mr. Dean on the carjacking counts and one count of being a felon in possession of a firearm. *Id.*

Pursuant to § 924(c), the district court was required to impose a mandatory consecutive sentence of five years (60 months) for the first possession of a firearm in furtherance of a crime of violence and 25 years (300 months) for the second, for a total of 30 years (360 months) to run consecutively with the sentence on any other counts. J.A. 50. The underlying robbery convictions did not carry a mandatory or consecutive sentencing requirement, and the U.S. Guidelines range for those offenses was 84–105 months. *Id.*

In light of the 30-year mandatory consecutive minimum under § 924(c), Mr. Dean requested a downward variance from the Guidelines range for the robbery offenses to impose a sentence of one day, which would result in a total sentence of 30 years and one day. J.A. 18. The Honorable Mark Bennett of the U.S. District Court for the Northern District of Iowa denied the variance. Judge Bennett explained that, "if [he] could look at a combined package" of all the offenses together, "360 months plus 1 day" would be "more than sufficient for a sentence in this case." J.A. 26; see also J.A. 21 (the prosecutor acknowledging that 30 years and one day "may very well be" reasonable). Nevertheless, Judge Bennett explained that he lacked discretion to "go down to one day" on the robbery counts because Eighth Circuit precedent required him "to look at [the underlying offenses] separately" from the § 924(c) counts. J.A. 25–26; see also J.A. 25 ("if it comes back [on remand], then I'll go down to one day [on the robbery counts]").

Accordingly, after considering the § 3553(a) factors in isolation from the 30-year mandatory sentence, Judge Bennett varied downward from the Guidelines

range of 84–105 months and imposed a sentence of 40 months for each robbery count, to run concurrently with each other. J.A. 25–27. Judge Bennett specifically noted that Mr. Dean did not have a violent criminal history, but had been involved only in "relatively minor things." JA 26. Further, the Judge determined a downward variance was appropriate because Mr. Dean "wasn't the weapons guy, and he wasn't kind of leading the charge [and] was much more of a follower." *Id.*; see also JA 22–23 (the prosecutor acknowledging that Mr. Dean "did not have the weapons," was "not as culpable" as his brother, and was "a follower").

Judge Bennett therefore imposed a total sentence of 400 months of imprisonment, comprising (i) the 60-month and 300-month mandatory minimums for the two § 924(c) convictions, to run consecutively to each other and to the other counts, and (ii) a 40-month sentence for each of the underlying offenses, to run concurrently with each other. J.A. 33.

Appellate Review

Mr. Dean appealed his sentence. He argued that *Pepper* v. *United States*, 562 U.S. 476 (2011), overruled the Eighth Circuit's precedent barring a court from considering a mandatory minimum sentence under § 924(c) when sentencing the defendant for the underlying felony offense. Petition for Writ of Certiorari at 6, *Dean* v. *United States* (No. 15-9260) (U.S. May 4, 2016).[1]

---

[1] Mr. Dean also appealed his first conviction, arguing that the victim was not engaged in the business of trafficking drugs. Last Term, this Court resolved the evidentiary burden of the commerce element of Hobbs Act convictions. *Taylor* v. *United States*, 136 S. Ct. 2074, 2082 (2016).

Without addressing *Pepper* or the governing provisions of the Sentencing Reform Act, the Eighth Circuit affirmed Mr. Dean's sentence based on its own precedent in *United States* v. *Hatcher*, 501 F.3d 931 (8th Cir. 2007). J.A. at 66-67. *Hatcher* held that under U.S.S.G. § 5G1.2(a) a district court lacks discretion to sentence a defendant to one day of imprisonment for "crimes not subject to a mandatory minimum, solely because [of] the mandatory sentence." *Id.* at 66. Deeming Mr. Dean's case indistinguishable from *Hatcher*, the court below determined that his aggregate sentence of 400 months was reasonable. *Id.* at 67.

SUMMARY OF THE ARGUMENT

A district court need not blind itself to the fact of a defendant's mandatory consecutive sentence under § 924(c) when determining the appropriate sentence for the underlying offense. The Eighth Circuit's contrary holding conflicts with the plain language of 18 U.S.C. §§ 3551, 3553(a), and 3661, and is not supported – much less compelled – by the language of § 924(c). Moreover, § 924(c)'s legislative history supports Mr. Dean's interpretation, and the rule of lenity resolves any ambiguity in his favor.

I.A. The foundation of any federal sentence is the Sentencing Reform Act, namely § 3553, which sets forth the purposes a district court must satisfy in imposing a sentence: proportionality, deterrence, incapacitation, and rehabilitation. § 3553(a)(2). "[A] sentencing judge's overarching duty under § 3553(a) [is] to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)," after due consideration of these and other enumerated factors. *Pepper*, 562 U.S. at 491. The same factors govern the length of a sen-

tence of imprisonment for multiple offenses, including the determination of whether multiple sentences should be concurrent or consecutive. §§ 3582(a), 3584(b).

To discharge this duty, a district court must be able to consider the fact of a defendant's § 924(c) sentence. Without taking into account the fact that a defendant will serve a lengthy mandatory minimum sentence, a district court cannot coherently assess the quantum of additional punishment that is "sufficient, but not greater than necessary" to punish the defendant, deter others, protect the public, and rehabilitate the offender. See § 3553(a); *United States* v. *Smith*, 756 F.3d 1179, 1183 (10th Cir. 2014).

This case perfectly illustrates these problems. Mr. Dean received an aggregate 30-year sentence for his two § 924(c) convictions, J.A. 27, 33, which the district judge determined would have been "more than sufficient" by itself to satisfy § 3553's purposes, J.A. 26. Nevertheless, the Eighth Circuit's rule precluded the district court from accounting for Mr. Dean's mandatory consecutive minimums, and the court was thus compelled to impose a sentence for the underlying offenses that, by its own determination, was greater than necessary to serve § 3553(a)'s purposes. See *id.*

I.B. Barring consideration of a defendant's § 924(c) sentence also conflicts with § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant that a district court "may receive and consider for the purpose of imposing an appropriate sentence." That provision "codifie[s] the 'longstanding principle that sentencing courts have broad discretion to consider various kinds of information'" in determining the proper sentence. *Pepper*,

562 U.S. at 488 (quoting *United States* v. *Watts*, 519 U.S. 148, 151 (1997) (per curiam)). This Court has emphasized that § 3661's "plain" and "broad" language "does not provide 'any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.'" *Id.* at 491 (quoting *Watts*, 519 U.S. at 152). The holding below, however, erects just such a barrier.

I.C. Nothing in § 924(c) contradicts the clear and broad commands of these other provisions. Section 924(c) imposes mandatory minimum sentences for defendants who use firearms "during and in relation to any crime of violence or drug trafficking crime." § 924(c)(1)(A). The statute specifies that these sentences for the gun crime must be "in addition to" and not "concurrent[] with" any sentence for the underlying offense. § 924 (c)(1)(A) & (D)(ii). It says nothing, however, about what the sentence for the underlying offense must (or must not) be, or whether a judge may take into account the § 924(c) sentence in determining the appropriate sentence for the underlying offense. Section 924(c) thus overrides a sentencing judge's usual discretion under § 3584(b) to order concurrent rather than consecutive sentences. But it does no more than that. Consequently, there is nothing in § 924(c)'s language that could overcome the district courts' duty under §§ 3553 and 3661 to consider all relevant information and impose a sentence that is minimally sufficient to achieve the purposes of sentencing.

Elsewhere, Congress expressly barred consideration of mandatory minimums in the setting of sentence for an underlying offense, so a similar limitation should not be read into § 924(c). 18 U.S.C. § 1028A, which similarly imposes consecutive mandatory minimums for identity theft "during and in rela-

tion to" other specified crimes, makes plain what § 924(c) does not: it says explicitly that a district court "shall not in any way reduce" the underlying sentence based on, "or otherwise take into account," the mandatory minimum when determining the proper sentence for the underlying offense. That Congress chose to impose such a limitation in § 1028A, but included no such language in § 924(c), is further proof that the latter cannot be read to support the holding below. See § 1028A; see also *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, No. 15-513, slip op. (U.S. Dec. 6, 2016) (quoting *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) ("Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision.").

II.A. The legislative history likewise shows that Congress did not intend to restrict district courts' traditional sentencing discretion as to the offense underlying a § 924(c) charge. Even as Congress debated and amended the provision that became § 924(c), it was careful to preserve that discretion, with key legislators even noting that § 924(c) would still permit a district judge to suspend entirely the underlying sentence. Moreover, in the pre-Guidelines environment, it would have made little sense for Congress to bar district courts from considering one specific fact during sentencing, as district courts had essentially unfettered discretion within the statutory ranges. *Burns* v. *United States*, 501 U.S. 129, 132–33 (1991). At the very least, if Congress intended such a novel change, there would be clearer evidence.

II.B. Even if the relevant statutory provisions contained an ambiguity that could support the government's position, the rule of lenity would require it to be resolved in Mr. Dean's favor. Indeed, for the government to prevail, it must show, based on "text,

structure, and history," that its reading of the statute is "unambiguously correct." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). It cannot make that showing. Accordingly, to the extent § 924(c) is unclear, Mr. Dean should still prevail.

III. The holding below is also contrary to the long history of affording trial courts broad discretion over the information used to determine sentence, which dates to the Founding. American courts have long "practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, 337 U.S. 241, 246 (1949). That venerated policy is now codified in the Sentencing Reform Act. The Court should not assume that Congress intended to depart further from this policy than § 924(c)'s plain language requires.

ARGUMENT

I. PLAIN STATUTORY LANGUAGE ESTABLISHES THAT A DISTRICT COURT MAY CONSIDER THE FACT OF A § 924(c) SENTENCE IN DETERMINING THE SENTENCE FOR THE UNDERLYING OFFENSE.

When a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). Here, the question presented—whether a district court may consider the fact of a defendant's mandatory § 924(c) sentence in determining the proper sentence for the underlying offense—is answered by the plain language of the Sentencing Reform Act and 18 U.S.C. § 3661, which

together set forth the factors a district court must consider in sentencing any federal defendant, and make clear that "possession of the fullest information possible" is "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence." *Pepper*, 562 U.S. at 488 (quoting *Williams*, 337 U.S. at 247). Considering a defendant's § 924(c) sentence is necessary, in at least some cases, to comply with these provisions.

Nothing in Section 924(c), is to the contrary. It states merely that the mandatory minimum sentence must be consecutive with the sentence for the underlying crime; it says nothing about what the underlying sentence must be. That silence is especially telling in light of Congress's decision to include in another statute—but not here—language restricting the district court's discretion to consider an automatic mandatory minimum sentence. Thus, § 924(c) does not contravene the commands of the Sentencing Reform Act and § 3661, which together foreclose the Eighth Circuit's rule.

A. The Sentencing Reform Act Authorizes District Courts To Consider A Defendant's § 924(c) Sentence.

The foundation of federal criminal sentencing is 18 U.S.C. § 3553(a), which sets forth the "factors to be considered in imposing a sentence" and commands the district court to "impose a sentence sufficient, but not greater than necessary, to comply with" those factors. At each step in the sentencing process, the statutory structure directs district courts to heed § 3553(a)'s instructions. That command cannot properly be implemented if district judges are forced to ignore the fact of a defendant's mandatory consecutive minimum sentence under § 924(c).

1. The Sentencing Reform Act of 1984 gave shape to the modern federal sentencing regime. Pub. L. No. 98–473, 98 Stat. 1837 (1984); see *Burns*, 501 U.S. at 132–33. Under that Act, federal sentencing begins with 18 U.S.C. § 3551, which directs that, "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2)." § 3551(a).

Section 3553(a), in turn, directs that a district court "shall impose a sentence sufficient, but not greater than necessary, to comply with" four enumerated purposes:

> The need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

§ 3553(a). Underscoring the centrality of these four factors, § 3553(a) separately dictates that, "in determining the particular sentence to be imposed," a district court "shall consider" these factors along with (among other things) "the nature and circumstances of the offense and the history and characteristics of the defendant" and "the kinds of sentences available." § 3553(a)(1), (3). Thus, as the government recently

acknowledged in another case before this Court, § 3553(a) directs the "district court's ultimate exercise of sentencing discretion" and the judge "must always consider th[e] factors" it sets forth. See Reply Brief for the United States at 4, 8, *Beckles* v. *United* States (No. 15-8544) (U.S. Nov. 21, 2016).

Section 3553(a)'s "sufficient, but not greater than necessary" requirement is known as "the parsimony principle," *i.e.*, a directive to impose "the least severe alternative that will achieve the purposes of the sentence." Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 68, 82 (2005). "The parsimony principle recognizes that severe penalties are expensive and usually harmful to offenders and that the crime-control benefits of such penalties are uncertain and often quite limited. Severe penalties should therefore be used as sparingly as possible." *Id.* at 68. In turn, § 3553(a)(2)'s enumerated factors give substance to the parsimony principle by setting forth the purposes the sentence must satisfy: proportionality, deterrence, incapacitation, and rehabilitation. *Id.* at 82; see also *Rita* v. *United States*, 551 U.S. 338, 348 (2007). Effectuating the parsimony principle, with reference to these factors, is "a sentencing judge's overarching duty." *Pepper*, 562 U.S. at 491.

The same factors govern the length of a sentence of imprisonment, including when a defendant has been convicted of multiple offenses. Section 3582(a) sets forth the factors to be considered in imposing a term of imprisonment, and like § 3551, it directs the district court back to § 3553(a): "The Court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a)." § 3582(a). And § 3584(b) governs multiple sentences of imprison-

ment, again directing that, "in determining whether the terms imposed are to be ordered to run concurrently or consecutively, [the court] shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a)."

In short, § 3551 empowers the imposition of federal sentences generally; § 3582(a) deals with whether a jail sentence should be imposed and, if so, for how long; and § 3584(b) governs the consecutive-or-concurrent question. *All* of these provisions instruct the district court to look to § 3553(a), which provides the "general directive" of sentencing, *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007): to impose "a sentence sufficient, but not greater than necessary, to comply with" § 3553(a)(2)'s enumerated purposes. A district court must therefore impose a sentence based on "an individualized assessment" that "consider[s] all of the § 3553(a) factors." *Id.* at 49–50 n.6; see also *Pepper*, 562 U.S. at 491.

2. These provisions squarely authorize a district court to consider "one of the most conspicuous facts about a defendant": that he will serve a lengthy sentence under § 924(c). See *Smith*, 756 F.3d at 1180 (Gorsuch, J.). That is because considering the fact of a defendant's § 924(c) sentence is often necessary to give effect to § 3553(a)'s overarching directive: the parsimony principle. See *Pepper*, 562 U.S. at 493. A court cannot "impose a sentence sufficient, but not greater than necessary" without taking into account how long the total sentence will actually be. See *id.* at 507 (because a "criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent . . . the trial court can reconfigure the [overall] sentencing plan . . . to satisfy the sentencing factors in 18 U.S.C. § 3553(a)"); *United*

States v. *Franklin*, 499 F.3d 578, 587–88 (6th Cir. 2007) (Moore, J., concurring) ("The § 3553(a) factors require the district court to give at least some consideration to the total amount of time that a defendant will spend in prison.").[2]

For example, consider § 3553(a)(2)(C)'s goal of "protect[ing] the public from further crimes of the defendant." The fact that a § 924(c) defendant will serve at least five years—or 25, or 30, or 105 years, *e.g.*, *Deal* v. *United States*, 508 U.S. 129, 131 (1993)—is surely relevant to whether any additional jail time is necessary to adequately protect the public from that defendant. See *Smith*, 756 F.3d at 1183 (noting that "the marginal benefit for public protection may appear quite different" as a defendant ages and is further removed from his criminal conduct); Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations in The Nurture Versus Biosocial Debate in Criminology* 377, 378 (Kevin M. Beaver et al. eds., 2015) ("It is now a truism that age is one of the strongest factors associated with criminal behavior."); see also *United States* v. *Presley*, 790 F.3d 699, 702 (7th Cir. 2015) ("Sentencing judges need to consider the phenomenon of aging out of risky occupations."). However, "if a

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[2] *See also, e.g.*, *United States* v. *Erpenbeck*, 532 F.3d 423, 438 (6th Cir. 2008) (evaluating whether the aggregate sentence complied with § 3553(a), and agreeing with the government that the allocation of the sentence among multiple counts made "no practical difference" to that analysis); *United States* v. *Santiago-Rivera*, 744 F.3d 229, 233–34 (1st Cir. 2014) (aggregate sentence was reasonable in light of the § 3553(a) factors); *United States* v. *Johnson*, 451 F.3d 1239, 1244 (11th Cir. 2006) (same); *cf. United States* v. *Bay*, 820 F.2d 1511, 1514 (9th Cir. 1987) ("It is incorrect to view the total sentence imposed upon [ ] a defendant as resulting from nothing more than a mathematical addition of each crime upon which he was convicted.").

district court determines that the history and characteristics of a particular defendant require incapacitation for a specific number of years, the [government's] rule would require the district court to sentence the defendant to that number of years *plus*" the mandatory minimum under § 924(c). *Franklin*, 499 F.3d at 588 (Moore, J., concurring) (emphasis added); see also *Smith*, 756 F.3d at 1183. That is nonsensical.

Likewise, consider § 3553(a)'s command that a sentence must "provide just punishment for the offense" and "afford adequate deterrence." § 3553(a)(2)(A), (B). The fact that the defendant is guaranteed a lengthy prison sentence under § 924(c) is unquestionably relevant to whether *additional* prison time is needed to appropriately punish him for the conduct underlying both offenses, or to deter others from engaging in that same conduct. Indeed, "sentencing courts . . . routinely consider the impact of a sentence already issued for one count of conviction when trying to determine the appropriate punishment under § 3553(a) for a related count of conviction." *Smith*, 756 F.3d at 1183 & n.1 (collecting cases). Considering this information is consistent with the courts' duty to account for "the kinds of sentences available" for the defendant. § 3553(a)(3). And not considering it would contravene the statute's command that a district court "shall consider" and impose a sentence "not greater than necessary" to serve § 3553(a)(2)'s enumerated purposes.[3]

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[3] Even those courts of appeals that require exclusion of the § 924(c) sentence as a consideration recognize that "the factors set out in § 3553(a) could lead the court to conclude that a shorter total sentence than the total specified for a § 924(c) conviction and recommended for the underlying crime would be appropriate." *United States* v. *Chavez*, 549 F.3d 119, 134 (2d Cir. 2008).

This case perfectly illustrates these problems. Mr. Dean received an aggregate 30-year sentence for his two § 924(c) convictions. J.A. 27, 33. That sentence will ensure that the public is protected from any recidivism until Mr. Dean is well into his fifties and decades removed from his most recent criminal act. That fact is plainly relevant to whether an additional four years (or seven years, or nine years, see *supra* p. 4) of incarceration for the underlying offenses is needed to adequately protect the public. It would make no sense, and would violate the parsimony provision of § 3553(a), for the district court to impose a sentence for Mr. Dean's underlying offenses that is independently sufficient to protect the public, and *then* tack on the mandatory minimums, yielding a far higher total sentence. Likewise, Mr. Dean's 30-year mandatory sentence is certainly relevant to whether any additional jail time is required to produce a total sentence that is proportionate and serves as a sufficient deterrent under §§ 3553(a)(2)(A) and (B).

The district court candidly acknowledged these problems at sentencing, observing that Mr. Dean's two § 924(c) sentences would have been "more than sufficient" by themselves to satisfy § 3553's purposes. J.A. 26. The district court was nevertheless compelled to impose a sentence for the underlying offenses that, by its own determination, violated the parsimony principle because it was greater than necessary to serve § 3553(a)'s purposes. See *id.* ("[I]f I could . . . I would sentence [Mr. Dean] to the two mandatory minimums which total 360 months and then give 1 additional day.").

Moreover, the exercise the Eighth Circuit's rule requires is at best highly artificial. A conscientious district judge will have great difficulty reconciling the statutory command to impose a sentence "not greater

than necessary" while at the same time disregarding the greater part of that very sentence. Even the most careful judge will not be able to simply disregard the multi-year (or multi-decade) § 924(c) sentence looming in the background. The Eighth Circuit's rule thus demands that district judges perform an essentially artificial exercise that reflects a significant departure from normal sentencing practice. Cf. *Bay*, 820 F.2d at 1514 ("[A] sentencing judge does not merely evaluate the gravity of each separate crime upon which a conviction was obtained, and then select a punishment that would be appropriate for each if considered independently . . . .").

* * *

In short, "a sentencing judge's overarching duty under § 3553(a) [is] to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)," after due consideration of those and the other enumerated factors. *Pepper*, 562 U.S. at 491. And properly discharging that duty will require a district court to take into account the defendant's aggregate sentence, including any § 924(c) mandatory minimum. None of this is to say that a district court must *reduce* the defendant's underlying sentence; in some cases, the mandatory consecutive minimum properly will not change the district court's bottom-line determination. See *Smith*, 756 F.3d at 1192. But in other cases, it may make a difference—as it did here. Mr. Dean's sentence is, by the sentencing judge's own estimation, at least 40 months longer than necessary to serve the purposes Congress has instructed the courts to follow. See J.A. 26. Nothing in the Sentencing Reform Act contemplates that result.

B. Section 3661 Confirms That There Is "No Limitation" On A District Court's Discretion To Consider The Defendant's § 924(c) Sentence.

Section 3553(a)'s instruction is confirmed by § 3661, which is equally unequivocal: "*No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (emphasis added). This provision "codifie[s] the 'longstanding principle that sentencing courts have broad discretion to consider various kinds of information'" in determining the proper sentence. *Pepper*, 562 U.S. at 488; see *infra* pp. 34–36. This Court has therefore "rejected proposal after proposal seeking to impose non-constitutional limits on the information a court may consider at sentencing." *Smith*, 756 F.3d at 1182 (collecting cases).[4]

This Court recently underscored the breadth of § 3661. See *Pepper*, 562 U.S. at 488–89. *Pepper* explained that this provision "expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" *Id.* at 489 (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)). The Court therefore rejected "[a] categorical bar on the consideration of postsentencing rehabilitation ev-

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[4] Although § 3661 works hand in hand with the other Sentencing Reform Act provisions, it actually predates both the Act and § 924, having been enacted in 1970 as § 3577. *See* Pub. L. No. 91-452, § 1001(a), 84 Stat. 922, 951 (1970). It was renumbered to § 3661 in 1984 as part of the Act.

idence," emphasizing that § 3661's "plain" and "broad" language "does not provide 'any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.'" *Id.* at 491.

The same principle applies here. For all the reasons explained above, a defendant's § 924(c) sentence is directly relevant to the determination of a proper overall sentence. *Supra* pp. 14–18. In fact, this Court has specifically rejected an effort to exclude information related to § 924(c), holding that § 3661 permits a sentencing court to enhance a defendant's sentence based on conduct alleged in a § 924(c) charge on which he was acquitted. *Watts*, 519 U.S. at 156–57. And "the case for applying § 3661 would seem a good deal more compelling here than there," as there are potential constitutional problems with enhancing a defendant's sentence based on facts not found by a jury, but "no one has identified any constitutional imperative that might prevent sentencing courts from applying § 3661 to reduce crime of violence sentences in light of simultaneously issued § 924(c) sentences." *Smith*, 756 F.3d at 1182–83.

In conjunction with § 3553(a), § 3661 gives force to the principle that "possession of the fullest information possible concerning the defendant's life and characteristics" is "'[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence.'" *Pepper*, 562 U.S. at 480 (quoting *Williams*, 337 U.S. at 246–47). The court below nevertheless enforced a "categorical bar" on considering this type of information, which "directly contravene[s] Congress' expressed intent in § 3661," see *id.* at 491, as well as this Court's "long recogni[tion] that sentencing judges 'exercise a wide discretion' in the types of evidence

they may consider when imposing sentence," *id.* at 480.

C. Section 924(c) Only Displaces A District Court's Discretion To Consider Whether Sentences Run Concurrently Or Consecutively.

Given the breadth and clarity of §§ 3553(a), 3661, and the other sentencing provisions discussed above, the Eighth Circuit's holding could be defensible only if § 924(c) squarely foreclosed consideration of the defendant's mandatory minimum sentence. It does not. Its sole effect here is to bar district courts from ordering § 924(c) sentences to run concurrently with the underlying sentence; no more, no less. Thus, the sentencing statutes say clearly that a district court may consider a § 924(c) sentence, and § 924(c) does not say otherwise. The holding below therefore violates the basic rule that "[w]here the text permits, congressional enactments should be construed to be consistent with one another." *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010).

1. Section 924(c)'s commands are clear—and limited. First, § 924(c)(1) simply sets forth the relevant mandatory minimum sentences:

> (A) . . . any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> . . .
>
> (C) In the case of a second or subsequent convic-

> tion under this subsection, the person shall—
>
> (i) be sentenced to a term of imprisonment of not less than 25 years . . . .

§ 924(c)(1)(A), (C).[5] This provision specifies that these minimum sentences must be imposed "in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime," § 924(c)(1)(A), but it says nothing about what that punishment must be.

Next, § 924(c)(1)(D) sets forth the relevant restrictions on the types of punishment to which a § 924(c) defendant is subject. It provides in full:

> Notwithstanding any other provision of law—
>
> (i) a court shall not place on probation any person convicted of a violation of this subsection; and
>
> (ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

§ 924(c)(1)(D).

Section 924(c) thus sets forth two requirements relevant to the relationship between the § 924(c) sentence and the underlying sentence: (i) the specified mandatory minimum must be imposed "in addition to the punishment provided for" the underlying offense,

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[5] Clauses (c)(1)(A)(i)–(ii), (c)(1)(B), and (c)(1)(C)(ii) specify further mandatory minimums based on the type of weapon involved (*e.g.*, a machinegun) or the manner of its use (*e.g.*, brandished or discharged). These provisions are not relevant here.

and (ii) it may not "run concurrently with . . . any term of imprisonment imposed for" that offense. That is all.

In light of its clear and limited language, § 924(c)'s interaction with the Sentencing Reform Act is easy to apprehend: "[C]onsecutive sentences must be issued even if the district court thinks concurrent sentences [are] sufficient to meet § 3553(a)'s policy objectives." *Smith*, 756 F.3d at 1184. Section 924(c) thus overrides a sentencing judge's usual discretion under § 3584(b) to order concurrent rather than consecutive sentences. Compare § 924(c)(1)(D)(ii), *with* § 3584(b). Indeed, that is the government's position. See Brief in Opposition at 16, *Dean* v. *United States* (No. 15-9260) (U.S. Sept. 9, 2016) (arguing that, in § 924(c), "Congress partially displaced the court's authority under Section 3584(b) to tailor the *aggregate* sentence").

But § 924(c) stops there. Thus, as the government acknowledges, Congress only "partially" displaced the district court's usual authority. *Id.* Section 924(c) does not say that a district court must disregard § 3553(a)(2)'s purposes in setting the defendant's underlying sentence (as would be required to override § 3553(a)). It does not say that a district court must ignore the fact of the § 924(c) sentence in making that determination (as would be required to override § 3661). In fact, "it does not say *anything* about how the underlying crime of violence must be punished." *Smith*, 756 F.3d at 1184. Rather, it requires only that the § 924(c) sentence must be "in addition to the punishment provided" for the underlying offense—whatever that punishment may be—and consecutive with "*any* term of imprisonment" for the underlying offense—whatever that term may be. See *id.* at 1185–86 (§ 924(c) "takes it as given that the proper

scope of punishment for a defendant's underlying crime is '*provided*' by some other lawful source").

As a result, the imposition of a sentence for the underlying offense that accounts for the § 924(c) sentence does not contravene any of that statute's terms. Even a sentence of one day for the underlying offense, as the district judge wanted to impose here, J.A. 26, still would be "in addition to" the § 924(c) sentence, § 924(c)(1)(A), and still would not "run concurrently with" that sentence, § 924(c)(1)(D)(ii). There is thus no conflict between § 924(c)'s plain language and either § 3553(a)'s parsimony principle or § 3661's directive that there is "[n]o limitation" on the facts a sentencing court may consider.

2. Section 924(c)'s silence as to the underlying sentence is particularly telling in light of Congress's explicit instructions in a parallel statutory provision, § 1028A. Much like § 924(c), § 1028A criminalizes identity theft "during and in relation to" certain specified felonies, § 1028A(a)(1), imposes a mandatory minimum sentence for the identity theft "in addition to the punishment provided for" the underlying offense, *id.*, and requires that the mandatory minimum sentence run consecutively to the sentence for the underlying offense, § 1028A(b)(2). But § 1028A *also* says what § 924(c) conspicuously does not: "[I]n determining any term of imprisonment to be imposed for the [underlying] felony . . . , *a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account*, any separate term of imprisonment imposed or to be imposed for a violation of this section." § 1028A(b)(3) (emphasis added).

It is thus clear that Congress "knows exactly how to alter traditional sentencing practices when it wishes, that when it does so it does so in ways and places

clear enough for all to see—and that it has done nothing of the kind in § 924(c)." *Smith*, 756 F.3d at 1185. And as this Court recently reiterated, "Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision." *State Farm Fire & Cas. Co.*, No. 15-513, slip op. (U.S. Dec. 6, 2016) (quoting *Marx*, 133 S. Ct. at 1177); see also, *e.g.*, *United States* v. *Ressam*, 553 U.S. 272, 277 (2008) (where Congress added specific phrasing to § 924(c) but not another similar statute, the difference in language "virtually command[ed]" that the two provisions be construed differently); *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 530 (1982) ("[A]lthough two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."). By the same token, reading § 924(c) to bar consideration of a defendant's mandatory minimum sentence would presumably mean that § 1028A's distinct language actually has no effect, see *Smith*, 756 F.3d at 1186–87, which would contravene the Court's "duty 'to give effect, if possible, to every clause and word of a statute," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955)). Section 1028A thus illustrates perfectly that § 924(c) cannot be read as the government would read it.

3. Despite all of this, some courts have suggested that considering a defendant's § 924(c) sentence "thwarts the will of Congress," because, by requiring the mandatory minimum to be imposed "in addition to" the underlying sentence, Congress must have intended the underlying sentence to have teeth as well. *E.g.*, *Chavez*, 549 F.3d at 135. This view rests on three fundamental errors.

First, as explained above, Congress said nothing in § 924(c) about the nature or extent of "the punishment provided for [the underlying] crime of violence or drug trafficking crime." § 924(c)(1)(A). To assume nevertheless that Congress must have intended that punishment to satisfy some unstated quantum of severity is to pursue Congress's perceived purpose at the expense of the words it actually used. "But no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1997); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

Second, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). But reading the anodyne phrase "in addition to" as dramatically restricting the district court's broad discretion under §§ 3553(a) and 3661 requires one to assume that Congress has done just that. See *Smith*, 756 F.3d at 1184. If Congress wanted to go even further beyond § 924(c)'s *explicit* departures from the usual sentencing regime, it surely could have said so—as it did in § 1028A. *Supra* pp. 24.

Third and in any event, allowing district courts to consider a defendant's § 924(c) sentence does not defeat Congress's purpose. To be sure, Congress meant § 924(c) to ensure increased punishment for defendants who use guns. *Infra* pp. 28–32. But § 924(c) accomplishes that purpose by "guarantee[ing] that—whatever the defendant's sentence for his underlying

offense—he will *at least* and *always* serve a certain number of years for his gun crime." *Smith*, 756 F.3d at 1185. And reading the statute to preserve a district court's obligations under §§ 3553(a) and 3661 while sentencing for the underlying offense is consistent with that purpose as expressed in the statute itself. All Congress did was create a floor (by imposing mandatory minimums) below which a defendant's total sentence may not drop via the mechanism of concurrent sentencing. It went no further.

Indeed, to transform the specific instructions in § 924(c) into general directives about the sentence for the underlying offense would be to totalize them in a way that defeats other congressional purposes. Section 924(c) must be interpreted "in the context of the *corpus juris* of which [it is] a part." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003). Anything more would both undermine the manifold and specific purposes of other statutes as well as distort Congress's general purpose—to enact a coherent body of law that serves multiple ends simultaneously.

* * *

Nothing in the text of § 924(c) limits the broad mandates that Congress has explicitly set forth in §§ 3553 and 3661. This omission is no accident. As § 1028A demonstrates, Congress knows exactly how to specify that a district court may not consider the effect of an additional mandatory minimum sentence when determining the proper sentence for the underlying conviction. To nevertheless infer that § 924(c) simply must be understood to limit judicial discretion as to the underlying sentence is to embrace the "false notion that the spirit of a statute should prevail over its letter." Antonin Scalia & Bryan A. Garner, *Reading Law, The Interpretation of Legal Texts*, 343 (2012).

II. TRADITIONAL TOOLS OF STATUTORY INTERPRETATION CONFIRM THE DISTRICT COURT'S DISCRETION TO CONSIDER A § 924(c) SENTENCE.

A. Congress Has Never Intended § 924(c) To Strip A District Judge's Sentencing Discretion As To The Underlying Offense.

Congress has never intended § 924(c) to cabin a sentencing court's discretion as to the underlying offense beyond generally applicable limits. Present-day § 924(c) first arose as a House floor amendment to the Gun Control Act of 1968. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978) (superseded by statute on other grounds). The House members debating the Gun Control Act perceived a "wave of unbridled crime" sweeping the country, 114 Cong. Rec. 22238 (1968), and decided it was "high time [to] deal with the criminal[s]." *Id.* at 22231.

In the context of this debate, Representative Robert Casey of Texas introduced a bill to impose an additional set of "stiff mandatory sentences" on a person convicted of using a gun in connection with certain crimes. *Id.* at 22229–22230. Although Representative Casey's bill included high mandatory minimum sentences, it did not prohibit a district judge from using the traditional tools of sentencing discretion such as suspension and concurrent imposition to determine the actual amount of time the convicted person would spend in prison. *Id.* at 22230.

Representative Harding Poff of Virginia then proposed an amendment to Representative Casey's bill. The Poff amendment substituted a range of years for the Casey bill's high mandatory minimums, but it also prohibited a district judge from ameliorating the

additional sentence through suspension, probation, or an order that the sentence run concurrently with the sentence for the underlying offense. *Id.* at 22231; see also *Busic* v. *United States*, 446 U.S. 398, 405-06 (1980) (explaining that Rep. Poff's comments are "crucial material" in determining the purpose of § 924(c)); *Simpson*, 435 U.S. at 13–14 (describing Rep. Poff's remarks as "clearly probative" and "certainly entitled to weight").

Although House members debated several aspects of the Casey bill and the Poff amendment, much of the debate concerned which legislation would *best preserve* a district judge's sentencing discretion. See *id.* at 22233–22237. For instance, Representative Frank Thompson of New Jersey threw his support behind the Poff amendment because its range of years gave the district judge "infinitely more discretion" than the Casey bill's high mandatory minimums. *Id.* at 22236. Representative Thompson's remarks drew a response from Representative Casey, who claimed that the trial "judge would have discretion" under his bill as well, because the judge "could suspend all or part" of the sentence. *Id.* Representative Poff then countered by noting that even his amendment would "not deny the trial judge the opportunity to suspend the sentence if imposed on the basic felony." *Id.* at 22237.

After additional debate, the House approved the Poff amendment. *Id.* at 22248. The Senate, however, revised the Poff amendment during the conference process to remove some of its more restrictive features. H.R. Rep. No. 90–1956 at 31–32 (1968). Most notably, the enacted version did not prohibit the district court from suspending the § 924(c) sentence or granting probation for a first-time offender, and it did

not prohibit concurrent sentences at all. Pub. L. No. 90–618, 82 Stat. 1224 (1968).

The key restrictions of the original Poff amendment were grafted back into the law in the ensuing years. Senator Michael Mansfield of Montana introduced a bill as part of the Omnibus Crime and Control Act of 1970 that reinserted the prohibition on concurrent sentences. 115 Cong. Rec. 29461–29462 (1969); Pub. L. No. 91–644, 84 Stat. 1890 (1970). And a 1984 amendment reinserted the prohibition on suspended or probationary sentences for first time offenders; it also clarified that the prohibition on concurrent sentences applied to both the first and any § 924(c) subsequent conviction (the 1970 Act was ambiguously worded in this regard). Pub. L. No. 98–473, 98 Stat. 2138–39 (1984). Finally, the 1984 amendment substituted much higher mandatory minimums for the range of years in the original law. Pub. L. No. 98–473, 98 Stat. 2138–39 (1984). Congress has made additional changes over the last three decades as well, but these changes have mostly just tailored § 924(c) to specific crimes or weapons. *E.g.*, Pub. L. No. 101–647, 104 Stat. 4829 (1990) (providing specific sentence for use of "short-barreled shotgun").

The legislative history of § 924(c) shows that, even as Congress has imposed tough (and ever-tougher) mandatory minimum sentences on persons who commit a crime with a gun, it has imposed these additional sentences against the consistent background assumption of judicial discretion, within general statutory limits, as to the length of the sentence for the underlying conviction. To be sure, the Congresses that shaped present-day § 924(c) intended "the gun offender" to "serve a separate and additional sentence for his act of using a gun." 116 Cong. Rec. 42150 (1970). The debate between Representatives Casey

and Poff demonstrates that the 1968 House intended the district judge to maintain discretion even as to the duration of the § 924(c) sentence. The mandatory minimums of present-day § 924(c) have now taken this discretion away. But what Congress has never taken away is the district judge's ability to account for the mandatory minimum in setting the consecutive sentence for the underlying offense. Representative Poff—the original author of what is now § 924(c)—believed that a district judge would continue to possess usual sentencing discretion in regard to "the basic felony." 114 Cong. Rec. 22237 (1968). Congress has never enacted anything to the contrary in § 924(c).

Moreover, Congress's intent to preserve the district judge's discretion as to the underlying conviction comports with the broader context in which it was working when it passed § 924(c). "Before the [Sentencing Reform] Act, Congress was generally content to define broad sentencing ranges, leaving the imposition of sentences within those ranges to the discretion of individual judges, to be exercised on a case-by-case basis." *Burns*, 501 U.S. at 132–33. Accordingly, it would have been bizarre—in fact, pointless—for Congress to intend that a district judge not consider the fact of a § 924(c) sentence, because district judges had essentially unfettered discretion with the given statutory ranges anyway. There was thus no reason for the 1968 or 1970 Congresses to think that preventing a district judge from considering one specific fact in the sentencing process would have any effect.

At the very least, if Congress had intended § 924(c) to create a unique exception to this default practice, it surely would have said so. In fact, however, Congress said just the opposite. Between the enactment of § 924(c) in 1968 and the 1970 Act amendments, Con-

gress passed present-day 18 U.S.C. § 3661, which of course places "no limitation" on the information a trial judge may consider when determining a sentence. Pub. L. No. 91-452, 84 Stat. 951.

Taken as a whole, the legislative history of § 924(c) makes clear that, while Congress intended to provide additional (and eventually mandatory consecutive) punishment for gun crimes, it never intended to cabin district courts' discretion to impose a sentence for the underlying offense that was appropriate in its pre-Guidelines discretion or consistent with § 3553(a) in the post-Guidelines era.

B. If The Relevant Statutory Language Were Ambiguous, The Rule Of Lenity Would Require It To Be Interpreted In Petitioner's Favor.

If this Court has any doubts as to whether § 924(c) might be interpreted to impinge *sub silentio* on the trial judge's otherwise unlimited discretion to consider any information relevant to the defendant's sentence, it should "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992). The text and structure of §§ 3551, 3553(a), and 3661 demonstrate that a trial judge both can and ought to consider the full range of available information when determining the appropriate sentence. Section 924(c) in no way countermands these statutory provisions—and as the legislative history shows, it was never meant to. Accordingly, the basic tools of statutory interpretation—text, structure, and history—all support Mr. Dean.

However, even if the government could make a colorable claim that the relevant provisions can be read as it would like, Mr. Dean should still prevail. This

Court has long held that it will "apply the rule of lenity and resolve the ambiguity in [the defendant's favor]" whenever the "text, structure and history fail to establish that the Government's position is *unambiguously* correct." *Granderson*, 511 U.S. at 54 (emphasis added); see also *Bifulco* v. *United States*, 447 U.S. 381, 400 (1980) (applying the rule of lenity to a sentencing issue).

The rule of lenity is simple: where there is ambiguity, "the tie must go to the defendant." *United States* v. *Santos*, 553 U.S. 507, 514 (2008); see also *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (quoting *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998)) (rule of lenity applies when there is a "grievous ambiguity or uncertainty in the statute"). This rule furthers deeply rooted legal principles. It protects a person from being "subjected to punishment that is not clearly prescribed" and it "keeps [the] courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

These principles mean that any ambiguity in the relevant statutes must be resolved in Mr. Dean's favor. And for all the reasons explained above, it is impossible to read § 924(c) as *unambiguously* barring district courts from considering or accounting for a defendant's mandatory minimum sentence. Neither § 924(c)'s plain language nor its structure clearly resolves this issue for the government. If Congress did in fact intend the more restrictive sentencing approach the government advocates, then the onus is on Congress to speak more clearly (as it did in § 1028A). To rule for the government in this case would be to expand criminal punishment. If that is to happen, it should not be done by the courts, and it cannot come at the expense of Mr. Dean, who should not "lan-

guish[] in prison unless the lawmaker has clearly said [he] should." *R.L.C.*, 503 U.S. at 305.

III. BARRING A DISTRICT COURT FROM CONSIDERING A § 924(c) SENTENCE IS CONTRARY TO THE LONGSTANDING POLICY OF SENTENCING DISCRETION AND INCONSISTENT WITH THE SENTENCING GUIDELINES.

Although the textual, structural, and contextual considerations above are more than sufficient to resolve this case, there is another reason § 924(c) should not be interpreted as the court below read it: That view contravenes the venerable policy of our judicial system that "[p]ermitting sentencing courts to consider the widest possible breadth of information about a defendant ensures that the punishment will suit not merely the offense but the individual defendant." *Pepper*, 562 U.S. at 488. That policy, which dates to the Founding, is now preserved in 18 U.S.C. §§ 3553(a) and 3661. In order to ensure that the Guidelines are advisory only, district courts must be permitted to vary from the applicable Guideline range "based on appropriate consideration of all the factors listed in § 3553(a)." *Id.* at 490.

A. The Holding Below Contravenes The Longstanding Policy Of Broad And Individualized Sentencing Discretion.

The Eighth Circuit's rule "sits uncomfortably with . . . the historical practice" of sentencing in this country. *Smith*, 756 F.3d at 1182. Dating back "both before and since the American colonies became a nation," this Court has repeatedly recognized the tradition of giving district courts broad discretion to fashion an appropriate sentence. *Williams*, 337 U.S. at 246. This tradition arises from a time when "courts

in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.*

Indeed, this Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States* v. *Booker*, 543 U.S. 220, 233 (2005); see also *Pepper*, 562 U.S. at 487–88 (collecting cases); *Gall*, 552 U.S. at 51 (affirming that an appellate court reviews a sentence under an abuse-of-discretion standard "[r]egardless of whether the sentenced imposed is inside or outside the Guidelines range"). "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon* v. *United States*, 518 U.S. 81, 113 (1996).

The few limits imposed on this discretion are carefully tailored. Apart from the Sentencing Reform Act, district courts are of course bound by "the range of sentencing options prescribed by the legislature," *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000), and they cannot impose a sentence based on facts that increase the permissible punishment unless such facts have been admitted or found by the jury, *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 (2013). There is no strict limit, however, on a district court's ability to deviate from a Guidelines sentence. *Rita*, 551 U.S. at 355. A district court is even free to choose a sentence based on a policy disagreement with the Guidelines. *Kimbrough* v. *United States*, 552 U.S. 85, 101–02 (2007).

Nor does this discretion evaporate in the presence of a mandatory minimum. Obviously, a district court generally cannot go below the floor a mandatory minimum creates. Cf. § 3553(e) (authorizing sentences below the mandatory minimum for substantial assistance). But under most mandatory minimum statutes—like § 924(c), but unlike § 1028A—the court retains its full discretion as to the proper sentence for any other counts of conviction.

In short, this policy of discretion reflects the reality that the sentencing judge is best positioned to gather and assess the whole kaleidoscope of facts that may bear on the proper sentence. "As part of this tradition, sentencing courts may examine and consider the impact of contemporaneously issued sentences." *Smith*, 756 F.3d at 1184. To artificially restrict that discretion by barring consideration of a crucial fact about the defendant's sentence is to "transform the act of sentencing . . . from a searching and fact-sensitive inquiry aimed at finding a fitting punishment into an enterprise built on a fiction, even a suspension of disbelief." *Id.* at 1181. The Court should not assume that Congress intended to effect such a change without saying so explicitly.

B. The Advisory Sentencing Guidelines Do Not Answer The Question Presented Here And In Any Event Recognize The Relevance Of A Defendant's Sentence Under § 924(c).

The question presented here is resolved by the statutory provisions discussed above, especially when considered in light of their history and context. Further, this case concerns the district court's desire to *vary* from the Guidelines range, an act that is not governed by anything in the Guidelines. See *Pepper*, 562 U.S. at 490 (district courts must be able to vary

"based on appropriate consideration of all of the factors listed in § 3553(a)" (citing *Gall*, 552 U.S. at 49–51)). The lower court, however, relied on its pre-*Gall* decision in *United States* v. *Hatcher*, which held that the Sentencing Guidelines bar a district court from varying from the Guideline range based on a defendant's § 924(c) sentence. 501 F.3d at 933 (citing U.S.S.G. § 5G1.2(a)). That reliance was misplaced. This case is not governed by anything in the Guidelines, and in any event, § 5G1.2 does not support the holding below.

The Guidelines specifically recommend that district courts consider a defendant's § 924(c) conviction when determining an appropriate sentence for the underlying offense. Section 2K2.4, for example, provides that district courts should not apply a weapons enhancement on the underlying offense when a defendant is convicted of § 924(c) because doing so would result in "duplicative punishment[s]." See *Smith*, 756 F.3d at 1188 (citing U.S.S.G. app. C, amend. 599; § 2K2.4 cmt. n.4). But if "the statute's text barred district courts from considering § 924(c) punishments when issuing sentences for underlying offenses, the guidelines' concern about double-counting would violate this textual command." See *id.* at 1188 & n.4; *United States* v. *Rodriguez*, 112 F.3d 26, 30 (1st Cir. 1997) ("That the [§ 924(c)] sentence had to be calculated independently does not mean that the sentence on the [underlying] counts did not depend on the existence of that sentence; to the contrary, the Guidelines specify such a relationship.").

Section 5G1.2 is not to the contrary. *Hatcher* read § 5G1.2(a)'s instruction backwards. 501 F.3d at 933–34. Rather than requiring an underlying sentence to be "imposed independently" of a mandatory minimum

sentence, this provision requires the reverse: "[T]he sentence to be imposed *on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment*, shall be determined by that statute and imposed independently." U.S.S.G. § 5G1.2(a) (emphasis added). Here, of course, the "count[s] for which" a statute requires a mandatory consecutive sentence are the § 924(c) counts, not the underlying offenses. And "[a]bsent in § 5G1.2(a) is any suggestion that the sentence *for the underlying crime* must be calculated without reference to the existence of the § 924(c) sentence." *Smith*, 756 F.3d at 1188 n.4.

In any event, § 5G1.2(a) at most concerns the Guidelines calculation and does not (and cannot) control the ultimate sentence the district court imposes for the underlying offense pursuant to 3553(a). See *id.*; accord *United States* v. *Vidal-Reyes*, 562 F.3d 43, 55 (1st Cir. 2009). After all, the Guidelines "are advisory only," *Kimbrough*, 552 U.S. at 91, and thus cannot be read to bar a district court from accounting for information that a statute expressly authorizes it to consider, see *Dorsey* v. *United States*, 132 S. Ct. 2321, 2327 (2012) (noting that "sentencing statutes . . . trump[] the Guidelines"); cf. *Gall*, 552 U.S. at 53 & n.9 (in properly "consider[ing] all of the § 3553(a) factors," the district court "gave specific consideration to [a] fact–not directly taken into account by the Guidelines"); *Watts*, 519 U.S. at 158 (Scalia, J., concurring) (the Sentencing Commission has no authority to declare that information within the scope of § 3661 "may not be considered").

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below and order the case remanded for resentencing.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

18 U.S.C. § 3551

(a) In general.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

18 U.S.C. § 3553(a)

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

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[1] So in original. The period probably should be a semicolon.

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3661

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 924(c)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be

sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. § 1028A

(a) Offenses.—

(1) In general.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) Terrorism offense.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) Consecutive sentence.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by

the Sentencing Commission pursuant to section 994 of title 28.

(c) Definition.—For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—

(1) section 641 (relating to theft of public money, property, or rewards), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

RECORD AND BRIEFS.

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In the Supreme Court of the United States

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a sentencing court, when sentencing a defendant who has been convicted of a firearms offense under 18 U.S.C. 924(c) and a predicate crime of violence, may reduce the sentence for the predicate offense to lower the aggregate sentence that results from the consecutive, mandatory-minimum sentence for the Section 924(c) offense.

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In the Supreme Court of the United States

No. 15-9260

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 45-67) is reported at 810 F.3d 521.

JURISDICTION

The judgment of the court of appeals (J.A. 68) was entered on December 29, 2015. A petition for rehearing was denied on February 12, 2016 (J.A. 70). The petition for a writ of certiorari was filed on May 4, 2016, and granted on October 28, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of conspiracy to commit Hobbs Act robbery and two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1);

and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g). J.A. 31, 33. The district court sentenced petitioner to 400 months of imprisonment, to be followed by three years of supervised release. J.A. 33, 35. The court of appeals affirmed. J.A. 45-67.

1. In April 2013, petitioner, his co-defendant brother (Jamal Dean), and others conspired to rob and robbed drug dealers of drugs and other property. J.A. 46-48. In each of the two robberies, petitioner and his brother brought a modified .22-caliber semiautomatic Mossberg rifle that they used to facilitate the robberies by threatening, intimidating, and battering their victims. Tr. 48-49, 52-54, 84-85, 194-196, 262-263, 272-273, 279, 405; see Tr. 125, 157, 328-329.

a. Jeffrey Rollinger (J.R.) was a known methamphetamine and marijuana dealer who sold drugs in Iowa and South Dakota. J.A. 53; Tr. 41, 60. Although J.R. sold such drugs for money, he also had previously sold methamphetamine to Sarah Berg (one of petitioner's co-defendants) and Jessica Cabbell (a prostitute) in exchange for sex. Tr. 42-43, 61, 146. Berg believed that J.R. had stolen $400 from her, and, while at a home in South Sioux City, Nebraska, she hatched a plan with petitioner, petitioner's brother, and Cabbell to rob J.R. when he was scheduled to have a "date" with Cabbell. Tr. 80-83, 146, 148-151, 169. Petitioner and Jamal were the "muscle" for that robbery. Tr. 151. As they prepared to execute their plan, petitioner was next to Jamal, who brandished the Mossberg rifle, which he could conceal in his pants because its handle had been modified, reducing its length to only two or three feet. Tr. 76-77, 83-85, 322;

see Gov't Exh. 33.8 (D. Ct. Doc. 286-96) (photograph of rifle).

On April 15, 2013, the group traveled to the motel in Sioux City, Iowa, at which Cabbell had agreed to meet J.R. for the "date." Tr. 120-121, 150. Cabbell first met with J.R. in his motel room, and the two began to smoke methamphetamine. Tr. 123, 152. A few minutes later, Berg, petitioner, and Jamal entered the room. Tr. 47-48, 123, 152-153. Berg confronted J.R. about her money, Tr. 48, 153; Jamal pulled the Mossberg rifle on J.R. and demanded money and drugs, Tr. 48-49, 155; and, while Jamal kept the rifle on J.R., petitioner "ransack[ed] the room looking for * * * drugs or money." Tr. 49-50; see Tr. 156. When J.R. attempted to stand, Jamal smashed the rifle's butt into J.R.'s head and threatened his life. Tr. 52, 54, 125, 154; see Tr. 57, 180.

The group ultimately failed to find any significant amount of drugs or money. Tr. 88, 131. They instead took J.R.'s pipe containing a small amount of methamphetamine, his cell phone, his car keys, and his car, which they drove back to Nebraska. Tr. 52-53; see Tr. 69, 131-132, 155-156.

b. Nine days later, early in the morning of April 24, 2013, petitioner and his brother robbed another interstate drug dealer, Craig Barclay (C.B.), at his home. J.A. 48; Tr. 188, 191-192, 194-196; see J.A. 53; Tr. 188-190 (interstate drug dealing). After entering the house, petitioner abruptly awoke C.B. in his bed and threatened him while Jamal pointed the rifle at the drug dealer. Tr. 192, 194-195. Jamal used the rifle to provide "cover[]" for petitioner and prevent C.B. from getting "out of hand," Tr. 201, enabling petitioner to take C.B.'s wallet, the contents of C.B.'s

pockets, and items from C.B.'s room. Tr. 195-196, 198-199. After C.B. had given the brothers all he had, Jamal raised the rifle over his head and brought it crashing down on C.B.'s skull. Tr. 196-197.

The brothers forced petitioner's former girlfriend, who was then living at C.B.'s house, to grab her belongings and leave with them in C.B.'s two cars. Tr. 256, 260-261. As they departed the house, petitioner carried the rifle and, as he entered a car, he placed the rifle on the floorboard between his legs. Tr. 262-263, 272-273, 279. In the end, the brothers robbed C.B. of approximately $300 in cash, 20 grams of the methamphetamine, a digital scale, a laptop computer, various other smaller items, and C.B.'s two cars. Tr. 198-200, 202-203, 261-262.

2. a. A federal jury found petitioner guilty on one count of conspiracy to commit Hobbs Act robbery (Count 1), in violation of 18 U.S.C. 1951(a); two counts of Hobbs Act robbery for the robberies of J.R. and C.B. (Counts 2-3), in violation of 18 U.S.C. 1951(a) and 2; two counts of possessing a firearm in furtherance of those crimes of violence (Counts 6 and 7), in violation of 18 U.S.C. 924(c)(1) and 2; and one count of possessing a firearm after having been convicted of a felony (Count 9), in violation of 18 U.S.C. 922(g). Verdict Form 11-18 (D. Ct. Doc. 284); see J.A. 31, 33; Third Superseding Indictment 3-14 (D. Ct. Doc. 154).

Petitioner's three Hobbs Act offenses are each punishable by a term of imprisonment of up to 20 years, 18 U.S.C. 1951(a); his felon-in-possession offense is punishable by a term of imprisonment of up to ten years, 18 U.S.C. 924(a)(2); and a sentencing judge has discretion to impose prison terms for those offenses

that run concurrently with each other and other terms of imprisonment. See 18 U.S.C. 3584(a) and (b).

Petitioner's convictions under Section 924(c) contain distinct sentencing instructions. Section 924(c) makes it an offense to "use[] or carr[y] a firearm" "during and in relation to any crime of violence or drug trafficking crime" or to "possess[] a firearm" "in furtherance of any such crime." 18 U.S.C. 924(c)(1)(A); see 18 U.S.C. 921(a)(3), 924(c)(2) and (3) (defining "firearm," "drug trafficking crime," and "crime of violence"). A Section 924(c) offense is thus "a combination crime," the basic version of which has as its elements both (1) the relevant possession, "use[,] or carriage of a gun" and (2) "the commission of a predicate (violent or drug trafficking) offense." *Rosemond* v. *United States*, 134 S. Ct. 1240, 1245, 1247-1248 (2014). When present "together[,] [those two elements] pose an extreme risk of harm." *Id.* at 1248.

Section 924(c) accordingly provides that "any person who" violates its prohibitions "shall, in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," to "a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i). "Notwithstanding any other provision of law," "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C.

924(c)(1)(D)(ii). In addition, Section 924(c) provides that "a court shall not place on probation any person convicted of a violation of [Section 924(c)]." 18 U.S.C. 924(c)(1)(D)(i).

b. At sentencing, petitioner agreed that, under the advisory Sentencing Guidelines, his three Hobbs Act counts (Counts 1-3) and his felon-in-possession count (Count 9) each carried an overall advisory Sentencing Guidelines range of 84 to 105 months. J.A. 15-17. But petitioner requested that the district court grant a downward variance and impose concurrent sentences of just one day for those four felony counts. J.A. 17-18. Petitioner argued that such a variance was warranted because the two remaining Section 924(c) counts carried "mandatory" five- and 25-year consecutive sentences and because, in petitioner's view, an aggregate sentence of 30 years of imprisonment was "more than sufficient to accomplish the goals of sentencing and to account for the criminal conduct in this case." J.A. 18; see J.A. 17-25.

The district court partially denied petitioner's request. J.A. 25-27. The court granted a downward variance from the 84-to-105-month Guidelines range to 40 months of concurrent imprisonment for each of petitioner's four non-Section 924(c) felonies. J.A. 15, 25. The court based that variance on its conclusion that petitioner "was much more of a follower" and "wasn't the weapons guy" in the counts of conviction and petitioner's "fairly extensive criminal history" involved "relatively minor things" without "any significant history of any violence." J.A. 25-26.

The district court declined to grant petitioner's request to vary further to just one day of imprisonment. J.A. 20, 23, 26-27. The court concluded that it must

"separately" evaluate the sentences for the non-Section 924(c) counts and the Section 924(c) counts and did not in this context have discretion to base its judgment on "the overall sentence" that would result. *Ibid.* "[I]f [it] w[ere] just looking at the conduct in [the Hobbs Act counts]," the court stated, "there's no way" that it would "vary down to one day" from the 84 months at the bottom of the Guidelines range, and it doubted that any "judge in the country" would grant such "an extraordinary variance." J.A. 23; see J.A. 20. The court accordingly "var[ied] down[ward]" to 40 months of imprisonment for petitioner's non-Section 924(c) felonies, J.A. 25, which when added to the 360 months of consecutive, mandatory-minimum sentences for petitioner's Section 924(c) counts, yielded a total sentence of 400 months of imprisonment, J.A. 27.

The district court further stated that it would "make a record" on which petitioner could appeal, adding that if petitioner were correct that the court could impose a single sentence as "a combined package," the court would sentence petitioner "to the two mandatory minimums which total 360 months and then give 1 additional day" for each of petitioner's four remaining felony convictions. J.A. 25-26.

3. The court of appeals affirmed. J.A. 45-67. As relevant here, the court held that the district court correctly rejected petitioner's request to impose a one-day concurrent sentence for each of his four non-Section 924(c) felony counts of conviction. J.A. 66-67. The court explained that it had previously held that a district court had unreasonably "sentenc[ed] a defendant to one day for the crimes not subject to [Section 924(c)'s] mandatory minimum, solely because the mandatory sentence was 300 months." J.A. 66 (dis-

cussing *United States* v. *Hatcher*, 501 F.3d 931, 933-934 (8th Cir. 2007), cert. denied, 552 U.S. 1170 (2008)). Because petitioner had identified "no meaningful difference between the situation in *Hatcher* and what [petitioner] requested in this case," the court concluded that the sentencing court did not abuse its discretion in declining to grant petitioner's request for one-day concurrent sentences. J.A. 67.

SUMMARY OF ARGUMENT

Petitioner requests that the sentences for his four non-Section 924(c) felonies be reduced to just one day in order to offset the effect of the mandatory-minimum sentences that Congress required for his firearms offenses under Section 924(c). That reduction is legally impermissible.

A. Section 924(c) requires that a court "shall" impose a mandatory five-year (or longer) sentence "*in addition to the punishment* provided for [the predicate offense]," 18 U.S.C. 924(c)(1)(A) (emphasis added), and directs that the additional punishment shall be imposed consecutively to "any other term of imprisonment," 18 U.S.C. 924(c)(1)(D)(ii). As such, "§ 924(c)'s longstanding thrust" has been "its insistence that sentencing judges impose *additional* punishment for § 924(c) violations" beyond the sentence for the predicate offense, a "command[] that [ensures that] all § 924(c) offenders shall receive additional punishment for their violation of that provision." *Abbott* v. *United States*, 562 U.S. 8, 20, 25 (2010).

Petitioner's submission would impermissibly allow a sentencing judge to reduce the sentence for the predicate and other non-Section 924(c) offenses to just one day *because* of the judge's belief that the total length of imprisonment that would result from Section

924(c)'s mandatory consecutive sentence is more than what is necessary. That outcome would negate the "addition[al]" term of imprisonment that Congress has required and its specific direction that the additional punishment must be "not less than five years," 18 U.S.C. 924(c)(1)(A)(i), thus effectively permitting sentencing judges to "carve out statutory exceptions [from Section 924(c)] based on judicial perceptions of good sentencing policy." *United States* v. *Gonzales*, 520 U.S. 1, 10 (1997).

B. The sentencing provisions of the Sentencing Reform Act, which Congress enacted at the same time as its revision to Section 924(c)'s sentencing provisions, confirm that understanding. Ordinarily, a sentencing court, after first separately establishing a sentence on each count of conviction that is appropriate for "the offense" in question, 18 U.S.C. 3553(a)(1) and (2); see 18 U.S.C. 3582(a), has discretion to set the total, aggregate length of imprisonment. It does so by virtue of specific statutory authority to make the separate terms of imprisonment for multiple offenses either wholly concurrent, partially overlapping, or fully consecutive. 18 U.S.C. 3584(a) and (b). Section 924(c), however, divests judges of that Section 3584 authority to set the total length of imprisonment by requiring that the Section 924(c) sentence run consecutively to all other terms of imprisonment. 18 U.S.C. 924(c)(1)(D)(ii). Petitioner's submission would impermissibly circumvent that important limitation.

C. Section 924(c)'s drafting history demonstrates Congress's intent to withdraw discretionary sentencing authority that might otherwise allow sentencing judges to eliminate Section 924(c)'s mandatory additional punishment. The relevant sentencing provi-

sions, which took form in January 1971 and were perfected in 1984, are designed to impose "a mandatory additional prison sentence for criminals who choose to resort to firearms" by "compel[ing] [those criminals] to *serve additional time in prison solely* for deciding to use a firearm." 115 Cong. Rec. 2567 (1969) (statement of Sen. Mansfield) (emphasis added). Original drafting deficiencies failed to withdraw discretion that could frustrate that goal and, in 1984, Congress took care to eliminate such loopholes by displacing every sentencing process—concurrent sentencing, suspension of imprisonment, probation, and parole—that might potentially stand as a barrier to that objective.

D. Petitioner argues that Congress merely intended Section 924(c)'s mandatory-minimum sentences to set a floor that ensures that offenders serve at least that amount of time in prison. That assertion, however, fails to account for Congress's separate provision of additional and consecutive punishment. Indeed, this Court has itself previously rejected the very same argument that petitioner resubmits in this case. *Abbott*, 562 U.S. at 20, 24.

Petitioner's position would result in anomalous sentencing outcomes that punish less culpable Section 924(c) offenders more harshly for the firearm offense than more serious offenders. The only apparent function of petitioner's reduced-to-one-day sentencing regime would be to avoid the congressionally imposed consecutive, additional, mandatory-minimum sentences in Section 924(c). That is reason enough to reject it.

E. The advisory Sentencing Guidelines establish a permissible method of sentencing in this Section 924(c) context. That framework requires a separate

calculation of a range on the predicate offense and acknowledges the limits on sentencing discretion to adjust the aggregate length of the resulting multiple terms of imprisonment. Those limits thus appropriately account for the mandatory additional and consecutive sentence under Section 924(c).

F. Petitioner's position is not supported by a judge's authority to consider any information about a defendant's "background, character, and conduct" during sentencing. 18 U.S.C. 3661. Even if the informational areas addressed by Section 3661 were thought to include consideration of statutorily mandated sentences that must be imposed on other counts of conviction, Section 924(c)'s relevant sentencing restrictions flow from provisions that curtail the scope of a judge's sentencing authority, not the information the judge may consider. The government has never argued that a judge must blind himself to any relevant facts, merely that a judge must exercise discretion within the constraints imposed by Congress.

G. Finally, petitioner argues that the aggravated identify-theft provisions in Section 1028A show that Congress could have drafted language specifically prohibiting courts from reducing sentences for predicate offenses based on a Section 924(c) sentence. But the provisions petitioner invokes impose a broader prohibition than that involved here. In any event, Section 1028A, which Congress enacted decades after Section 924(c)'s relevant sentencing provisions, is an unreliable guide for inferring congressional intent underlying Section 924(c).

ARGUMENT

THE DISTRICT COURT CORRECTLY REJECTED PETITIONER'S INVITATION TO IMPOSE ONLY ONE DAY OF IMPRISONMENT FOR EACH OF PETITIONER'S FOUR NON-SECTION 924(c) FELONY OFFENSES

Section 924(c) makes it a crime to use, carry, or possess a firearm in connection with any federal crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A). Any person who violates that prohibition "shall, in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," shall "be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i). Section 924(c) further provides that, "[n]otwithstanding any other provision of law," no term of imprisonment imposed under Section 924(c) "shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for [the predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii).

Those provisions, particularly when read in conjunction with the sentencing provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*), reflect Congress's intent that sentencing courts (1) impose a criminal sentence for the conduct underlying any non-Section 924(c) count of conviction that is appropriate for that offense and then (2) impose the punishment for the Section 924(c) offense on top of such a sentence. That reading is confirmed by Section 924(c)'s drafting history, which reflects Congress's repeated

strengthening of the statute's sentencing provisions. Indeed, as this Court has observed, the "longstanding thrust" of Section 924(c) is "its insistence that sentencing judges impose *additional* punishment for § 924(c) violations." *Abbott* v. *United States*, 562 U.S. 8, 20 (2010).

Nothing in Section 924(c) or in the overall framework for sentencing established by the Sentencing Reform Act supports the "implausible" conclusion that Congress left courts free to negate the imposition of "additional punishment for § 924(c) violations," *Abbott*, 562 U.S. at 20 (emphasis omitted), by zeroing out sentences for separate and simultaneous convictions in order to offset the mandatory-minimum prison sentence that Congress adopted for Section 924(c). Petitioner's contrary contention fails to account for the language of Section 924(c) and the relevant provisions of the Sentencing Reform Act, rests on a misreading of Section 924(c)'s drafting history, and, if adopted, would produce anomalous sentencing results.

A. Section 924(c)'s Text And Function Mean That A Court May Not Impose A One-Day Sentence For A Predicate Offense That Would Not Be Appropriate Absent The Additional Punishment Under Section 924(c)

Three primary textual features demonstrate that a district court may not reduce a term of imprisonment for a Section 924(c) predicate offense below the length that would be appropriate if the defendant were not also subject to punishment under Section 924(c). Section 924(c)'s distinctive status as a "combination" offense that builds upon a federal predicate offense, Congress's direction to impose a mandatory sentence "in addition to the punishment provided for [that predicate offense]," 18 U.S.C. 924(c)(1)(A), and Con-

gress's order to run the term of imprisonment under Section 924(c) consecutively to any other term of imprisonment, 18 U.S.C. 924(c)(1)(D)(ii), together mean that a district court may not impose otherwise-unjustified prison terms of just one day for each of petitioner's two predicate Hobbs Act robberies and his two other felony convictions in order to offset the full impact of Section 924(c)'s mandatory-minimum term of imprisonment.

1. Section 924(c) makes it "a discrete offense to use, carry, or possess a deadly weapon in connection with [certain federal predicate offenses]." *Abbott*, 562 U.S. at 12. The "basic" offense under Section 924(c) is "using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime." *Dean* v. *United States*, 556 U.S. 568, 574 (2009). The statute therefore constitutes a type of "combination crime," requiring proof of both "the commission of a predicate (violent or drug trafficking) offense" and the relevant possession, "use[,] or carriage of a gun." *Rosemond* v. *United States*, 134 S. Ct. 1240, 1245, 1248 (2014). As such, anyone who violates Section 924(c) is "guilty of unlawful conduct twice over": He is guilty both of "a violent or drug trafficking offense" punishable under federal law and of violating Section 924(c)'s distinct prohibition against "the use, carrying, or possession of a firearm in the course of that offense." *Dean*, 556 U.S. at 576.

That distinctive feature of Section 924(c) reflects the statute's important function. A criminal who engages in a predicate offense "for which"—in the words of Section 924(c)—"the person may be prosecuted in a court of the United States," 18 U.S.C. 924(c)(1)(A), is

guilty of a "federal crime[]." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). The government therefore could already prosecute the criminal under federal law in federal court without recourse to Section 924(c). Congress, however, deemed the punishment imposed by federal courts for such a predicate offense to be insufficient. It accordingly enacted Section 924(c) to punish yet further "the temporal and relational conjunction of [the] two separate acts" of the predicate offense and the use, carrying, or possession of a firearm "on the ground that together they pose an extreme risk of harm." *Rosemond*, 134 S. Ct. at 1248.

To that end, Section 924(c) provides that "any person who" violates its distinct criminal prohibition "shall, *in addition to the punishment* provided for [the predicate] crime of violence or drug trafficking crime," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," to "a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i) (emphasis added); see *Deal* v. *United States*, 508 U.S. 129, 131-136 (1993). Congress, moreover, went beyond imposing that new and "addition[al]" punishment. Section 924(c) further provides that "[n]otwithstanding any other provision of law," "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii).[1]

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[1] Congress also enacted enhanced versions of the firearms offense for even more dangerous methods of use and types of firearms. Section 924(c)'s mandatory-minimum prison term accordingly increases when a firearm is "brandished" (seven years) or

2. Those provisions demonstrate that a term of imprisonment imposed for Section 924(c)'s "combination" crime must be added to the term of imprisonment for a predicate offense that is appropriate for the defendant's conduct underlying that offense.

a. First, by requiring that "a term of imprisonment" for a Section 924(c) offense "shall" be imposed "*in addition to* the punishment provided for [the predicate offense]," 18 U.S.C. 924(c)(1)(A) (emphasis added), Congress instructed that a prison term for the firearms offense must be imposed "over and above" the punishment for that predicate. *Webster's Third New International Dictionary* 24 (1971) (defining "in addition to"). That direction does not merely instruct a sentencing judge to impose a separate sentence. A judge must always impose such a sentence for each separate count of conviction. Nor does the "in addition to" direction mean that imprisonment for the firearms offense must run consecutively to a term of imprisonment for the predicate offense. Because Congress separately "mandat[ed] consecutive sentences" in Section 924(c)(1)(D)(ii), see *Gonzales*, 520 U.S. at 6, giving the same consecutive-sentence reading to Section 924(c)'s distinct "in addition to" phrase would impermissibly render the latter superfluous.

"discharged" (ten years), see 18 U.S.C. 924(c)(1)(A)(ii) and (iii); when the firearm possessed is "a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon" (ten years) or "a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler" (30 years), 18 U.S.C. 924(c)(1)(B)(i) and (ii); and when the offense that constitutes "a second or subsequent [Section 924(c)] conviction" involves a machinegun, destructive device, silencer, or muffler (life imprisonment), 18 U.S.C. 924(c)(1)(C)(ii). Petitioner was not convicted of any such enhanced offense.

See *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (discussing the "most basic interpretive canon[]" that no part of a statute should be rendered "inoperative or superfluous") (citation omitted). Section 924(c)(1)(A) therefore must require more: It requires that the term of imprisonment for Section 924(c) be "over and above" an appropriate punishment for the predicate offense conduct.

That is the whole point of Section 924(c)'s distinctive "combination" offense. Section 924(c) specifically targets the "extreme risk of harm," *Rosemond*, 134 S. Ct. at 1248, inherent when a defendant commits a federal predicate offense that itself can *already* "be prosecuted in a court of the United States," 18 U.S.C. 924(c)(1)(A), while using, carrying, or possessing a firearm. Section 924(c) can therefore apply only when the government proves beyond a reasonable doubt that the defendant has committed the (separate) predicate offense. *Rosemond*, 134 S. Ct. at 1245, 1247. And if the government can prove that predicate offense in federal court, it can already obtain a separate federal conviction and sentence of imprisonment for that separate statutory offense.

The "punishment provided for such [a predicate] crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A), in the absence of a Section 924(c) conviction—*i.e.*, the punishment that the government could already obtain under federal law *without* a Section 924(c) conviction—is therefore the logical baseline upon which Congress sought to impose the additional gun-targeting sanction in Section 924(c). Indeed, if Section 924(c) is to have practical force beyond the pre-existing statutory predicate offense on which it is built, it must provide its additional punishment be-

yond the "punishment provided for [the predicate offense]," *ibid.* That is why, as this Court has explained, "§ 924(c)'s longstanding thrust" has been "its insistence that sentencing judges impose additional punishment for § 924(c) violations," a "command[] that [ensures that] all § 924(c) offenders shall receive additional punishment for their violation of that provision." *Abbott*, 562 U.S. at 20, 25 (emphasis omitted). And Congress has itself specified the "addition[al]" punishment that "shall" be imposed: at least five years for a first Section 924(c) offense and at least 25 years for second or subsequent offenses. 18 U.S.C. 924(c)(1)(A)(i) and (C)(i).

Congress's 1984 amendment to Section 924(c) reinforces that conclusion. Before that amendment, this Court had held that Section 924(c) did not apply at all when the federal offense that would serve as its predicate "is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used." *Busic* v. *United States*, 446 U.S. 398, 399-400 (1980); see *Simpson* v. *United States*, 435 U.S. 6, 7, 16 (1978) (holding that a sentencing court cannot apply both a statutory weapons enhancement for the predicate offense and a sentence for violating Section 924(c)). Congress "repudiated" that result in 1984 by making clear that Section 924(c) applies even when "the underlying [predicate-offense] statute" itself "'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Gonzales*, 520 U.S. at 10 (quoting amendment now codified at 18 U.S.C. 924(c)(1)(A)). As amended, therefore, Section 924(c) applies and requires an "addition[al]" prison term, even when the predicate-offense statute on

which Section 924(c)'s "combination" crime rests itself includes a weapons-based sentencing enhancement.[2]

b. Congress's related direction "mandating [a] consecutive sentence[]" for a Section 924(c) conviction, *Gonzales*, 520 U.S. at 6, reinforces the point. Section 924(c)(1)(D)(ii) provides that "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii). As a result, the total length of an offender's imprisonment must be increased by the entire term of the mandatory-minimum sentence imposed under Section 924(c). That consequence of the consecutive-sentencing requirement would often be thwarted if, as petitioner contends (Br. 24), a sentencing court may reduce the underlying term of imprisonment for the predicate offense to just "one day" in order to offset the "addition[al]" punishment that must be imposed for the firearms offense.

Take, for example, a defendant who uses a firearm to assault and intimidate a federal employee on account of his official duties in violation of 18 U.S.C. 111(a) and (b). Cf. *Busic*, 446 U.S. at 400-401 (ad-

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[2] Section 924(c) additionally prohibits a sentencing judge from imposing a term of probation for the predicate offense. Probation is generally an authorized type of sentence for a federal offense that may be imposed as an alternative to imprisonment. See 18 U.S.C. 3551(b)(1), 3561-3566; see also S. Rep. No. 225, 98th Cong., 1st Sess. 90 (1983). But Section 924(c) provides that "[n]otwithstanding any other provision of law," "a court shall not place on probation any *person* convicted of a violation of [Section 924(c)]." 18 U.S.C. 924(c)(1)(D)(i) (emphasis added); cf. *Deal*, 508 U.S. at 132 (holding that "conviction" in Section 924(c) "refers to the finding of guilt" before sentencing).

dressing similar Section 111 offense). That provision permits a prison sentence of up to 20 years. 18 U.S.C. 111(b). If the sentencing court determines that a five-year sentence for Section 111's enhanced firearms-use offense is the appropriate one in light of the particular firearms use, the court would also presumably conclude that a total, aggregate sentence of five years is all that would be necessary notwithstanding the additional Section 924(c) conviction, because the court has already accounted fully for the firearm in arriving at its calculation of a five-year sentence. Cf. *ibid.* (enhanced penalty for firearm use); Sentencing Guidelines §§ 2A2.2, 2A2.4(c)(1) & Ch. 5, Pt. A (relevant provisions). Under petitioner's view, the judge should then impose a one-day sentence for the Section 111 offense and a five-year mandatory consecutive sentence under Section 924(c), to produce a total, aggregate sentence of just five years and one day.

Such a reduction in the term of imprisonment for the predicate offense *because* of Section 924(c)'s mandatory-minimum sentence would effectively negate Section 924(c)'s consecutive-sentence requirement. Congress would not have enacted Section 924(c)'s combination offense to provide "additional" and consecutive punishment beyond the predicate offense, merely to obtain just one day of additional imprisonment. Approving that outcome would effectively "carve out statutory exceptions [from Section 924(c)] based on judicial perceptions of good sentencing policy." *Gonzales*, 520 U.S. at 10. And it would do so in the precise context in which Congress amended Section 924(c) to augment the punishment that can be imposed on a Section 111 offender who uses a gun. See *ibid.* (Congress's 1984 amendment to Section

924(c) "repudiated" *Busic*, which rejected Section 924(c)'s application in this context). Indeed, "after *Busic*, § 924(c) *demands* a discrete punishment even if the predicate crime itself 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Abbott*, 562 U.S. at 25 (emphasis added; citation omitted). And given Congress's "command[] that all § 924(c) offenders shall receive additional punishment for their violation of that provision," it is "implausible" that Congress would have authorized such a loophole "severely limiting application of th[at] instruction." *Id.* at 20, 25.

B. The Sentencing Reform Act's Provisions Confirm That A District Court May Not Reduce The Term Of Imprisonment For A Predicate Offense Merely To Offset The Length Of A Prison Term Under Section 924(c)

The sentencing provisions of the Sentencing Reform Act confirm that understanding. The Comprehensive Crime Control Act of 1984 (CCC Act), Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, both amended Section 924(c), see *id.* § 1005(a), 98 Stat. 2138, and significantly revised federal sentencing law by enacting the Sentencing Reform Act, see *id.* Tit. II, Ch. II, 98 Stat. 1987 (enacting 18 U.S.C. 3551 *et seq.*). The Sentencing Reform Act, in turn, establishes distinct procedures governing how sentencing courts should determine (1) the appropriate sentence of imprisonment for each individual offense for which a defendant is convicted, 18 U.S.C. 3582(a), and (2) the aggregate sentence when a defendant is convicted of multiple criminal offenses, 18 U.S.C. 3584. As a result, "if a defendant is convicted of a number of offenses," the Act is designed so that "the sentences for each of the multiple offenses [should] be determined separately and the

degree to which they should overlap [should then] be specified." S. Rep. No. 225, 98th Cong., 1st Sess. 176-177 (1983) (*1983 Senate Report*). Section 924(c) eliminates a sentencing court's normal authority in the latter process under Section 3584 to determine the total, aggregate length of imprisonment from multiple terms of imprisonment. That withdrawal of authority demonstrates that such a court many not exercise control over the total length of imprisonment by reducing the sentence on the predicate offense to offset the effect of Section 924(c)'s mandatory-minimum prison term.

1. Each count of conviction carries its own sentence the length of which is determined by evaluating the Section 3553(a) factors

The Sentencing Reform Act provides that the sentence for each individual offense must be determined in light of the factors in Section 3553(a). Under Section 3553(a), a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [Section 3553(a)(2)]," 18 U.S.C. 3553(a), "to the extent that [those purposes] are applicable," 18 U.S.C. 3551(a). See *Tapia* v. *United States*, 564 U.S. 319, 325 (2011). The "four considerations [embodied in Section 3553(a)(2)]—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally." *Ibid.* And those general purposes of sentencing jointly reflect one of "the seven sentencing factors [enumerated in Section 3553(a)(1) to (7)] that courts must consider in imposing sentence." *Pepper* v. *United States*, 562 U.S. 476, 504 (2011) (rejecting argument that would "elevate two § 3553(a) factors

above all others"); see *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007).

Congress's description of the Section 3553(a) factors reflects the practice of separately imposing an appropriate sentence for each offense for which a defendant has been convicted. The first two factors that a sentencing judge must consider before imposing a "particular sentence" include "the nature and circumstances of *the* offense" in question, 18 U.S.C. 3553(a)(1) (emphasis added), and "the need for the sentence imposed" "to reflect the seriousness of *the* offense" and "to provide just punishment for *the* offense," 18 U.S.C. 3553(a)(2) (emphasis added). The sentence for such "an offense" generally may include a term of probation (under Sections 3561-3566), a fine (under Sections 3571-3574), and a term of imprisonment (under Sections 3581-3586). 18 U.S.C. 3551(a). The provisions governing those distinct components likewise specify that each may be imposed as part of a sentence when it is statutorily authorized for "the offense" or the category of offenses of which the particular offense is a part. See, *e.g.*, 18 U.S.C. 3561(a)(2), 3571(b)(1), 3581(b).

Within that framework, Congress directed that a sentencing judge shall consider "the factors set forth in [S]ection 3553(a)" when evaluating the length, amount, or other characteristics of each component of the sentence. 18 U.S.C. 3562(a) (probation), 3572(a) (fine), 3582(a) (imprisonment). Absent a mandatory sentence, therefore, the "length of the term [of imprisonment]" that a court must determine under Section 3582(a) requires focusing on whether the selected term of imprisonment is sufficient to punish "the offense" adequately. 18 U.S.C. 3553(a)(1) and (2); see 18 U.S.C. 3582(a).

2. *The total length of imprisonment resulting from multiple terms of imprisonment is determined under Section 3584 using the Section 3553(a) factors*

Once "the sentences for each of the multiple offenses [have been] determined separately," *1983 Senate Report* 176-177, other provisions of the Sentencing Reform Act govern the total length of imprisonment that results from aggregating the individual terms of imprisonment. That additional step is necessary because, although the term of imprisonment for each individual offense should "reflect the seriousness of the offense" in question and "provide just punishment for th[at particular] offense," 18 U.S.C. 3553(a)(2), determining the lengths of such multiple terms of imprisonment does not necessarily resolve the additional question of what total punishment is appropriate for the defendant who is convicted of multiple offenses with prison terms. A judge who sentences a defendant to five years for one offense and two years for another, for instance, would logically conclude that the defendant should be punished with at least five years of imprisonment because that is the term the judge imposed for one offense standing alone. But that conclusion does not address whether a five-year term is all that is necessary or whether a greater aggregate punishment is warranted in light of all of the circumstances.

Congress specifically addressed such considerations by enacting Section 3584. Section 3584 thus "provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense," *1983 Senate Report* 125-126, by "grant[ing] sentencing judges broad authority to 'run' multiple sentences either 'concurrently or consecu-

tively,'" *United States* v. *LaBonte*, 520 U.S. 751, 769 (1997). The statute reflects the general and "traditional[]" rule that sentencing judges possess "discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences." *Setser* v. *United States*, 132 S. Ct. 1463, 1468 (2012) (citing *Oregon* v. *Ice*, 555 U.S. 160, 168-169 (2009)).

As a result, Section 3584 confers discretion to determine the overall length of imprisonment appropriate for a defendant convicted of multiple crimes. Once the appropriate length of each individual term of imprisonment for each count of conviction has been determined, the judge's additional determination under Section 3584 specifying whether those terms are to be "fully consecutive," partially "overlapping," or fully "concurrent," see *1983 Senate Report* 127, 165, will yield the total, aggregate length of imprisonment for all the offenses. The "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently" under Section 3584 are then "treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. 3584(c). Cf., *e.g.*, 18 U.S.C. 3624 (governing timing of prisoner's release).

Section 3584 "grants sentencing judges" such discretionary authority, *LaBonte*, 520 U.S. at 769, by providing that when "multiple terms of imprisonment are imposed on a defendant," they "may" (with one exception not relevant here) be ordered to "run concurrently or consecutively." 18 U.S.C. 3584(a); see *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (The "word 'may' clearly connotes discretion.") (citation omitted). Section 3584 further provides that the judge, "in determining whether" to

order the separate prison terms "to run concurrently or consecutively, *shall consider*, as to *each offense* for which a term of imprisonment is being imposed, the *factors set forth in section 3553(a)*." 18 U.S.C. 3584(b) (emphasis added). That instruction to set the overall length of imprisonment through consecutive and concurrent sentencing determinations after reevaluating "the nature and circumstances of the offenses" (plural), "the history and characteristics of the offender," and the other Section 3553(a) factors applicable to each offense "simply serves to call attention to the fact that in this sentencing determination [under Section 3584], the principal focus should be upon the purposes to be served by the sentence, and that the sentence should be structured accordingly." *1983 Senate Report* 128.

3. Section 924(c) withdraws a judge's discretionary authority to set the total length of imprisonment under Section 3584

a. Section 924(c), however, significantly alters the application of that statutory sentencing framework. Although the sentencing court is still required to determine the "length of the term" of imprisonment for each offense (see 18 U.S.C. 3582(a)) such that the term of imprisonment on each individual count is "sufficient" to "reflect the seriousness of" and to "provide just punishment for the [particular] offense" at issue, 18 U.S.C. 3553(a) and (a)(2)(A), Congress partially displaced the court's authority under Section 3584(b) by eliminating its ability to determine the total, *aggregate* sentence to reflect a length that the court concludes is "sufficient, but not greater than necessary" (18 U.S.C. 3553(a)), to advance the objectives listed in Section 3553(a). Congress did so in Section

924(c) by prohibiting the sentencing court from making any term of imprisonment imposed under Section 924(c) "run concurrently with any other term of imprisonment." 18 U.S.C. 924(c)(1)(D)(ii). That requirement that a term of imprisonment for each Section 924(c) offense "run consecutively to all other prison terms" specifically "cabin[s] the sentencing discretion of district courts" in this context. *Gonzales*, 520 U.S. at 9-10.[3]

That withdrawal of a sentencing judge's discretionary authority under Section 3584 to determine the *total* length of imprisonment for multiple prison terms also necessarily displaces Section 3584's associated requirement that the judge consider "the factors set forth in section 3553(a)," 18 U.S.C. 3584(b), before exercising the (withdrawn) discretion to set the total length. Although the judge may still determine whether terms of imprisonment for non-Section 924(c) offenses run concurrently or consecutively to each other, Section 924(c) wholly displaces the judge's ability to determine the total length of imprisonment by placing the additional firearms sentence beyond the judge's discretionary control. See Sentencing Guidelines § 5G1.2(a) & comment. (n.2(A)) (sentence for Section 924(c) offense "shall be * * * imposed independently").

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[3] Section 3584 by its own terms recognizes the superseding force of statutes like Section 924(c). 18 U.S.C. 3584(a) ("Multiple terms of imprisonment imposed at the same time [will] run concurrently *unless* the court orders or *the statute* mandates that the terms are to run consecutively.") (emphasis added). The drafters of the Sentencing Reform Act likewise identified "18 U.S.C. 924(c)" as a statute that displaces the discretionary decision normally governed by Section 3584. See *1983 Senate Report* 127 & n.313.

b. Petitioner agrees (Br. 23) that Section 924(c) "overrides a sentencing judge's usual discretion under § 3584(b) to order concurrent rather than consecutive sentences." But petitioner insists (Br. 14) that notwithstanding that withdrawal of discretion, the judge "cannot 'impose a sentence sufficient, but not greater than necessary' [under Section 3553(a)] without taking into account how long the total sentence will actually be." Petitioner argues, for instance, that the judge must apply Section 3553(a)'s parsimony principle to decide how much total prison time is needed, for instance, to "adequately protect the public from th[e] defendant" and provide "'just punishment for the offense.'" Br. 15-16 (quoting 18 U.S.C. 3553(a)). Petitioner further asserts (Br. 17) that "[t]his case perfectly illustrates these problems." Those contentions lack merit.

First, petitioner's invocation of the Section 3553(a) factors is misplaced. Those factors are normally relevant in determining the total length of imprisonment for multiple offenses. See 18 U.S.C. 3584(b). But, as explained above, Congress through Section 924(c) has withdrawn the sentencing judge's authority under Section 3584 to determine that total, aggregate length based on the judge's consideration of the Section 3553(a) factors. See pp. 24-27, *supra*.

Petitioner relatedly observes (Br. 17), that the district court stated that, in its view, the two consecutive Section 924(c) sentences totaling 30 years of imprisonment in this case were "not just sufficient," they were "*more than* sufficient" based on the judge's own assessment of the Section 3553(a) factors. J.A. 26 (emphasis added). But Congress in Section 924(c) has *itself* determined that such sentences not only are

appropriate but that they cannot run concurrently with any other sentence. And just as a sentencing judge cannot properly invoke Section 3553(a)'s principles to impose a sentence below a statutory minimum when the judge deems that minimum "more than sufficient," a judge cannot displace Congress's determination that such a Section 924(c) sentence must be "in addition to the punishment provided for [any predicate offenses]," 18 U.S.C. 924(c)(1)(A).

In contending otherwise, petitioner disregards the process for determining the sentence for each *separate* term of imprisonment for his non-Section 924(c) counts of conviction. See pp. 22-23, *supra* (discussing that process). Where, as here, the sentencing judge would impose a 40-month term of imprisonment for each such offense if the judge did not consider the length of Section 924(c)'s mandatory-minimum term, J.A. 26, a one-day sentence could not properly reflect the relevant Section 3553(a) factors. A sentence of one day for such a non-Section 924(c) felony offense would not itself reflect "the need for the sentence imposed" "to reflect the seriousness of *the* offense" at issue and "to provide just punishment for *th[at]* offense," 18 U.S.C. 3553(a)(2) (emphasis added). See J.A. 20, 23 (expressing doubt that any "judge in the country" would grant such "an extraordinary variance").

C. Section 924(c)'s Drafting History Reflects Congress's Intent To Withdraw Discretionary Sentencing Authority To Effectively Eliminate Section 924(c)'s Additional Punishment

Section 924(c)'s drafting history from 1971 onward reflects Congress's longstanding goal of curtailing sentencing discretion in order to ensure that Section

924(c) will impose an undiminished incremental prison term prescribed by statute. The 1984 amendments in particular demonstrate that, at the same time that Congress redesigned the federal sentencing framework in the Sentencing Reform Act, it took care to displace every sentencing process—concurrent sentencing, suspension of imprisonment, probation, and parole—that might potentially stand as a barrier to that objective.

1. a. In 1968, when Congress enacted Section 924(c), the provision lacked the stringent sentencing provisions contained in present law. See Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223-1224. That original statute provided, in pertinent part, that whoever uses or carries a firearm in connection with a predicate felony offense "shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years" and, "[i]n the case of his second or subsequent conviction under [Section 924(c)], such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years." 18 U.S.C. 924(c) (Supp. IV 1968).

b. Congress promptly amended Section 924(c) to strengthen its sentencing provisions. In February 1969, Senator Mansfield introduced a bill containing the text that Congress later enacted in January 1971 as an amendment to Section 924(c) (with a minor change not relevant here). See 115 Cong. Rec. 2567-2568 (1969).[4] The Senator repeatedly explained that

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[4] The Senate passed Senator Mansfield's bill (S. 849), see 115 Cong. Rec. at 34,838-34,840, before it inserted the bill's text as an amendment to the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1889 (enacted Jan. 2, 1971). See 116

his amendment would require "a mandatory additional prison sentence for criminals who choose to resort to firearms" by "compel[ing] [those criminals] to *serve additional time in prison solely* for deciding to use a firearm." *Id.* at 2567 (emphasis added); see also, *e.g.*, *id.* at 34,838 (explaining that the "sentence imposed * * * would be in addition to the sentence for the [predicate] crime itself" to "penalize[] [the criminal] solely for choosing to use or carry a gun"); *Firearms Legislation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 17-18 (1969) (*1969 Senate Hearings*) (testifying that the "mandatory" sentence imposed "solely for [the criminal's] choice to use a gun" was designed to be "so severe as to deter his use of this deadly weapon"). The bill sought to achieve that objective in two ways: It amended Section 924(c) to provide that, first, the prison sentence for a Section 924(c) offense shall be "in addition to the punishment provided for the commission of [the predicate offense]"; and, second, "notwithstanding any other provision of law," a sentencing court could not (at least in the context of a second or subsequent conviction) run Section 924(c)'s prison term "concurrently" with the prison term for the predicate offense. See 115 Cong. Rec. at 2568 (reproducing bill); cf. 18 U.S.C. 924(c) (Supp. IV 1968) (original statute).

Senator Mansfield recognized that requiring Section 924(c)'s prison term to be imposed "in addition to the punishment" for the predicate offense would not itself ensure that sufficient punishment would be imposed upon repeat Section 924(c) offenders. His

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Cong. Rec. 35,734, 42,150 (1970); see also H.R. Conf. Rep. No. 1768, 91st Cong., 2d Sess. 20-21 (1970).

amendment thus also required the imposition of a consecutive term of imprisonment under which "there [would be] no way [to avoid] this additional sentence" because "no discretion [was] given" to the sentencing judge. 116 Cong. Rec. 42,150 (1970) (statement of Sen. McClellan in colloquy with Sen. Mansfield); see *1969 Senate Hearings* 19 (statement of Sen. Dodd) (observing that the amendment would "strip[] the judiciary of a very important power of [sentencing] judgment"); *ibid.* (statement of Sen. Mansfield) (agreeing and stating that "some of the discretion which we give to the judiciary should be stripped").

c. In the years leading up to 1984, Congress concluded that yet further amendments were necessary to close gaps in Section 924(c)'s sentencing provisions.

Courts had determined, for instance, that although the then-existing statute was "ambiguous on the subject," a consecutive sentence had "not [been made] mandatory" for a first Section 924(c) offense. *United States* v. *Gerard*, 491 F.2d 1300, 1306 n.5 (9th Cir. 1974); see *United States* v. *Gaines*, 594 F.2d 541, 545-546 & n.7 (6th Cir.), cert. denied, 442 U.S. 944 (1979). Attorney General William French Smith thus testified that he had "adopted [a] far-reaching proposal" and would "strongly support" a statutory fix for the aforementioned "ambigu[ity]" and other flaws in "draft-[manship]" that allowed a person convicted under Section 924(c) to "be given a suspended sentence or be placed on probation for his first violation." *Report of the Attorney General's Task Force on Violent Crime: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 9, 17 (1981) (*1981 House Hearings*); see also *1983 Senate Report* 312 & n.2 (identifying these "drafting prob-

lems"). Those amendments to further "tie the hands of judges" were opposed by the American Bar Association, see *1981 House Hearings* 205, and, later, by the Judicial Conference of the United States on the ground that they would magnify "the degree of inflexibility" in sentencing. See *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 656 (1983) (*1983 Senate Hearings*).

The Senate passed a bill (S. 2572) in 1982 that would have revised Section 924(c) to fix these perceived "flaws" and "eliminate[] the discretionary elements of the existing law," which rendered Section 924(c) "ineffective." 128 Cong. Rec. 26,531 (1982) (statement of Sen. Levin); *id.* at 26,533 (statement of Sen. Thurmond) (supporting amendment to "eliminat[e] loopholes now used to evade mandatory minimum prison terms."); see *id.* at 26,581 (passage), 26,610-26,611 (revision to Section 924(c)). The House of Representatives, however, failed to act on the legislation before the 97th Congress came to an end. See *Comprehensive Crime Crime Control Act of 1983: Message from the President of the United States*, H. Doc. No. 32, 98th Cong., 1st Sess. 1 (1983) (*President's Message*).

In early 1983, President Reagan transmitted an Administration-drafted bill building upon the legislation that had stalled in the prior Congress. *President's Message* 1. Among the proposed provisions that the President deemed "important in rolling back the tide of criminal activity that threaten[ed] our Nation," *ibid.*, was the amendment to Section 924(c) that Congress later enacted in 1984 without modifica-

tion. Compare *id.* at 320-321 (text) with CCC Act § 1005(a), 98 Stat. 2138 (18 U.S.C. 924(c) (Supp. II 1984)).[5] In addition to solving the same drafting deficiencies in Section 924(c) that S. 2572 had targeted, the 1984 amendment included language specifically designed to repudiate the Court's decisions in *Busic* and *Simpson* by clarifying that Section 924(c) will apply and require the imposition of an additional term of imprisonment even when the predicate offense has its own statutory weapons enhancement. See *1983 Senate Hearings* 199 (formal statement of Department of Justice); *1983 Senate Report* 312 & nn.3-4 (similar); see also *Gonzales*, 520 U.S. at 10; see pp. 18-19, *supra* (discussing amendment).

The 1984 amendments to Section 924(c) thus significantly enhanced the statute's sentencing provisions by curtailing discretionary sentencing authority in three important ways. First, as amended, Section 924(c) required every term of imprisonment for its firearms offense to run consecutively to the prison sentences imposed for the predicate offense and (for the first time) for "any other term of imprisonment."[6]

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[5] The relevant portions of the Administration's bill (S. 829) were incorporated into a clean bill (S. 1762) reported by the Senate Judiciary Committee, *1983 Senate Report* 1-2 & n.9, 37, that the Senate passed. 130 Cong. Rec. 1587 (1984). Most of the provisions of S. 1762, including the bill's amendment to Section 924(c) and its chapter establishing the Sentencing Reform Act, were subsequently incorporated into an omnibus joint budget resolution (H.J. Res. 648) that Congress enacted into law. See CCC Act, Ch. II, 98 Stat. 1987 (Sentencing Reform Act); *id.* § 1005(a), 98 Stat. 2138 (amending Section 924(c)).

[6] See 18 U.S.C. 924(c) (Supp. II 1984) ("Notwithstanding any other provision of law, * * * the term of imprisonment imposed under this subsection [shall not] run concurrently with any other

Second, the statute eliminated a sentencing judge's discretion to suspend any term of imprisonment and place on probation a person convicted of a Section 924(c) offense, cf. 18 U.S.C. 3651 (1982) (repeal effective 1987) (authorizing suspension of sentence), as well as the authority of the United States Parole Commission to parole any such individual who had served at least one-third of his prison term, cf. 18 U.S.C. 4205(a) (1982) (repeal effective 1987) (governing parole).[7] Third, the statute required fixed, mandatory five- and ten-year prison sentences for first and repeat Section

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term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried.").

[7] See 18 U.S.C. 924(c) (Supp. II 1984) ("Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection * * * . No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.).

In the same 1984 Act that amended Section 924(c), Congress repealed the underlying statutory authority for suspending sentences and granting post-sentencing parole. See Sentencing Reform Act §§ 212(a)(2), 218(a)(5), 98 Stat. 1987, 2027 (repealing Chapters 231 and 311 of Title 18, U.S. Code, which had included 18 U.S.C. 3651 and 4205 (1982)). But because the effective date of that repeal was delayed until November 1, 1987, *id.* § 235(a)(1), 98 Stat. 2031; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728; see *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 400 & n.4 (1991), Section 924(c)'s prohibition against suspended sentences and parole remained in force until 1987, when the then-new Sentencing Guidelines framework took effect. Congress subsequently amended Section 924(c) to remove the now-obsolete references to suspending sentence and parole, but Section 924(c) retains its consecutive-sentencing requirement and its prohibition on probation, see 18 U.S.C. 924(c)(1)(D), both of which remain important under the current sentencing framework. See 18 U.S.C. 3561, 3584(a) and (b).

924(c) offenders, thereby eliminating a judge's sentencing discretion to select a prison term from the prior one-to-ten- and two-to-25-year statutory ranges. Compare 18 U.S.C. 924(c) (Supp. II 1984) with 18 U.S.C. 924(c) (1982). Those changes accordingly perfected Senator Mansfield's original vision that Section 924(c)'s mandatory prison sentence would "compel [criminals] to serve additional time in prison solely for deciding to use a firearm," 115 Cong. Rec. at 2567, with "no way" to "avoid[]" that "separate and additional sentence" because "no discretion [had been] given" to reduce it, 116 Cong. Rec. at 42,150.

d. The salient sentencing provisions of Section 924(c) that took form in 1984 continue to exist in current law. And "[b]etween 1984 and 1998, Congress [repeatedly] expanded the reach or increased the severity of § 924(c) on four [separate] occasions," with the 1998 revision ultimately converting "what were once mandatory sentences [of specified durations] into [the] mandatory minimum sentences" now present in the statute. *Abbott*, 562 U.S. at 17, 23-24 & n.6 (citation omitted).

2. Petitioner's description of Section 924(c)'s evolution largely focuses on the debates surrounding the 1968 enactment of the statute. See Br. 28-30. Those debates, however, shed no light on Congress's enactment and subsequent enhancement of the sentencing provisions at issue here, which were first adopted in January 1971 with Senator Mansfield's amendments. See pp. 30-36, *supra*. Petitioner addresses the relevant decades of history in a paragraph and concludes that Congress's "consistent background assumption" in Section 924(c) has been one "of judicial discretion * * * as to the length of the sentence for the underly-

ing conviction." Br. 30. That assertion cannot be squared with the overwhelming record of Congress's intentional restriction of sentencing discretion in this context. See pp. 30-36, *supra*.

Petitioner declares, for instance, that "Congress [has] said nothing in § 924(c) about the nature or extent of 'the punishment provided for the underlying [predicate offense]'" and that the government's failure to recognize this point is a "fundamental error[]." Br. 25-26 (brackets and citation omitted). By 1984, however, Congress had prohibited a sentencing judge from, for instance, "plac[ing] on probation or suspend[ing] the sentence of *any person* convicted of a violation of [Section 924(c)]," not just a sentence "*imposed* under [Section 924(c)]." 18 U.S.C. 924(c) (Supp. II 1984) (emphasis added). That prohibition barred probation and the suspension of a predicate-offense sentence. Section 924(c) similarly continues to bar probation today. See 18 U.S.C. 924(c)(1)(D)(i); see also p. 19 n.2, *supra*; cf. p. 35 & n.7 (authority to suspend sentences was repealed in 1987).

Moreover, Congress regulated the appropriate punishment for the underlying predicate offense through its enactment of the Sentencing Reform Act. Central to that effort was the creation of sentencing procedures that separated (1) a court's determination of the individual terms of imprisonment for each count of conviction based on factors relevant to *each such offense* from (2) the court's additional discretionary determination under Section 3584 setting the total, aggregate length of imprisonment produced by multiple prison terms through concurrent and consecutive sentencing determinations. See pp. 21-27, *supra*. Section 924(c)'s withdrawal of the latter authority

thus ensured that the statute would compel violators to "serve additional time in prison" to the full extent specified in Section 924(c) "solely for deciding to use a firearm." See 115 Cong. Rec. at 2567. Simply put, the statute's "longstanding thrust" has been its "insistence that sentencing judges impose *additional* punishment for § 924(c) violations." *Abbott*, 562 U.S. at 20. Petitioner's belief that "Congress adopted a less aggressive mode of applying § 924(c)" is "implausible." *Ibid.*

D. Petitioner's Understanding Of Section 924(c)'s Sentencing Provisions Is Incorrect, Produces Anomalous Sentencing Results, And Serves No Legitimate Sentencing Function

1. Petitioner ultimately argues (Br. 26-27) that "Congress's purpose" in Section 924(c) was merely to "create a floor (by imposing mandatory minimums) below which a defendant's total sentence may not drop," thus ensuring that the defendant will always be incarcerated for the period specified in Section 924(c) for the firearms offense. That argument does not reflect a realistic understanding of Section 924(c).

If Congress had intended to create a "floor," it would have simply drafted Section 924(c) to impose a mandatory-minimum term of imprisonment (*e.g.*, no less than five years, 18 U.S.C. 924(c)(1)(A)(i)). Imposing a single minimum term of imprisonment itself ensures that the defendant will be incarcerated for the length of that term, even when the term is not imposed "in addition" or consecutively to another term of imprisonment. This Court has therefore rejected the contention that Section 924(c) reflects "a modest scheme designed simply to ensure that all § 924(c) offenders 'serve at least [the statute's mandatory-

minimum] 5 years in prison.'" *Abbott*, 562 U.S. at 20 (citation omitted). "If Congress wanted to ensure that § 924(c) offenders 'receive at least five years in prison,'" the Court explained, "there was an obvious solution: Congress could have excised all prescriptions ordering that § 924(c) sentences shall run consecutively to other sentences" and rested on the bare imposition of a mandatory-minimum sentence. *Id.* at 24 (citation omitted).

2. Petitioner's position, if adopted, would result in anomalous sentencing outcomes.

Take, for instance, two co-defendants in a Hobbs Act robbery with equivalent criminal histories, both of whom possessed a gun but engaged in significantly different offense conduct. If the sentencing judge were to determine based on the Section 3553(a) factors that a two-year overall sentence was sufficient for the minor player but that a five-year sentence was appropriate for the leader, the judge should, under petitioner's view, impose on both defendants the mandatory-minimum five-year term of imprisonment for the Section 924(c) offense and add a one-day sentence for the predicate offense, yielding an aggregate five-year-and-one-day sentence for both. With such sentences, however, the "additional punishment" for the Section 924(c) offense would produce an aggregate sentence only one day longer than the five-year sentence that the more serious offender would have obtained without the Section 924(c) conviction. By contrast, the "additional punishment" for the less culpable offender would increase his aggregate sentence by more than three years.

Both "additional punishments" not only are significantly less than the five years of "additional" punish-

ment mandated by Section 924(c), see 18 U.S.C. 924(c)(1)(A)(i), they perversely sanction the less culpable defendant much more severely for the firearms offense and let the more serious offender get off with only a nominal, one-day increase. Congress would not have countenanced such anomalous outcomes. Those anomalies are entirely eliminated if a judge imposes Section 924(c)'s mandatory-minimum sentence "in addition to the punishment" appropriate for the predicate offense.

3. Significantly, the *only* apparent function of petitioner's proposed sentencing regime appears to be to skirt congressionally imposed mandatory-minimum sentences that must be imposed both "in addition" and consecutively to the punishment for other crimes. Outside the context of a statute requiring a mandatory and consecutive sentence, a sentencing judge would never have occasion to impose the type of reduced-to-one-day sentence that petitioner advocates. If the judge, for instance, determines that two offenses committed by a defendant warrant terms of imprisonment of five and two years respectively when they are considered separately, the judge has determined that the defendant should be incarcerated for at least five years. If the judge further determines that no more punishment is necessary, the judge may make both terms of imprisonment run concurrently under Section 3584. That process ensures that each of the two terms of imprisonment appropriately "reflect[s] the seriousness of the offense" for which it was imposed and "provide[s] just punishment for th[at] offense," 18 U.S.C. 3553(a)(2).

Petitioner's approach frustrates Section 924(c) by allowing a judge to achieve the same result in a Sec-

tion 924(c) case by reducing the predicate-offense sentence to a single day. Petitioner has not identified, and the government is not aware of, any federal or historical practice of imposing a term of imprisonment of just one day for one of multiple offenses where the judge has concluded that the offense by itself would warrant longer time. No reason exists for such an odd practice, because the historical discretion of a judge to impose concurrent and consecutive sentences has traditionally allowed the judge to control the total term of imprisonment. Here, however, Congress specifically withdrew that discretion embodied in Section 3584 in this firearms context. As such, petitioner's proposed sentencing regime would simply serve to circumvent Congress's decision to strip judges of sentencing discretion to control the total length of imprisonment without serving any permissible sentencing function.

E. The Sentencing Guidelines Reflect A Permissible Method Of Sentencing In This Section 924(c) Context

The Sentencing Commission has adopted a framework that incorporates Section 924(c) with its general provisions. That framework reinforces the conclusion that a reduction to a one-day sentence on the predicate offense is not appropriate.

1. Because the sentence of imprisonment for each offense must be based on the "circumstances of th[at] offense," 18 U.S.C. 3553(a)(1), which often shares common offense conduct with other offenses, the Sentencing Guidelines generally require a sentencing judge to evaluate as a group all closely related counts and then to determine an overall offense level for the related offense conduct. See Sentencing Guidelines §§ 3D1.1(a)(1)-(2), 3D1.2, 3D1.3. After a combined

offense level has been determined for all groups of closely related counts, see *id.* §§ 3D1.1(a)(3), 3D1.4, that offense level determines the punishment that the Guidelines recommend be separately imposed (subject to any statutory maximum punishment) "on *each* * * * count" of conviction." *Id.* § 5G1.2(b) (emphasis added).

Next, the Guidelines address how to determine the total term of imprisonment under Section 3584. See *1983 Senate Report* 165 (stating that the Guidelines should address "the appropriateness of concurrent, consecutive, or overlapping sentences"). "If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment," the Guidelines recommend that (to the extent allowed by law) the "sentences on all counts [should] run concurrently." Sentencing Guidelines § 5G1.2(c). Otherwise, the sentencing court should direct that the "sentence imposed on one or more of the other counts shall run consecutively" "to the extent necessary" to produce what the court deems to be an appropriate total punishment. *Id.* § 5G1.2(d). That is done by considering "the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a))." *Id.* § 5G1.3, comment. (n.4(A)).

2. The Guidelines, however, instruct sentencing courts to modify that normal approach when Section 924(c) convictions are involved. Any count of conviction based on a statute like Section 924(c), for instance, in which Congress has specified a term of imprisonment and required that it run consecutively, is excluded from the Guidelines process above. Sentencing Guidelines § 5G1.2(b). The Guidelines instead provide that the sentence for each such count "shall be

determined by that statute and imposed independently." *Id.* § 5G1.2(a) & comment. (n.2(A)). Such a sentence must, as required by statute, be imposed consecutively to the Guidelines sentences for other offenses. *Ibid.*

The advisory Guidelines, whose advice the court must consider, also reflect the view that a judge may account for the fact of a Section 924(c) conviction in a particular, limited manner. When a defendant has an accompanying Section 924(c) conviction, the Guidelines do not apply an enhancement to the offense level for the predicate offense based on the defendant's use, carrying, or possession of a firearm during that offense. See Sentencing Guidelines § 2K2.4, comment. (n.4). Such an enhancement is unwarranted, the Commission concluded, because the Section 924(c) punishment specified by Congress already accounts for the distinct involvement of the firearm in the offense. See *id.* § 2K2.4, comment. (backg'd) ("To avoid double counting, when a sentence under [Section 924(c)] is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.").[8]

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[8] The district court followed the Guidelines' recommendation and did not apply a weapons enhancement to the offense level for petitioner's predicate and other non-Section 924(c) offenses when calculating his 84-to-105-month advisory Guidelines range. See PSR ¶¶ 19, 29; J.A. 15-17 (adopting relevant PSR calculations). The government did not appeal or cross-appeal from that Guidelines calculation or the district court's variance from the Guidelines range that produced 40-month concurrent terms of imprisonment for petitioner's non-Section 924(c) offenses. See J.A. 26-27 (variance). Cf. *Greenlaw* v. *United States*, 554 U.S. 237, 243-253 (2008).

Because the Guidelines are advisory, a district court exercising its sentencing discretion may still elect to enhance the punishment on the non-Section 924(c) conviction when a firearm is involved in the offense. But it may also consider that Congress has specified by statute a separate punishment under Section 924(c) for the *additional* danger of possessing or using a firearm during the predicate offense and consider that factor in exercising discretion when sentencing on the individual non-Section 924(c) count under Section 3553(a).

Section 924(c) does not prohibit a court from exercising its discretion in this manner. As noted, Congress amended Section 924(c) in 1984 to abrogate the Court's decisions in *Busic* and *Simpson*, which construed Section 924(c) as inapplicable if the statute prohibiting the offense that serves as the Section 924(c) predicate already included a weapons enhancement. See pp. 18-19, 34, *supra*. The 1984 amendment clarified that a predicate crime of violence or drug trafficking crime under Section 924(c) "includ[es]" an offense "that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 924(c)(1)(A); see *Gonzales*, 520 U.S. at 10. That amendment did not address the separate question whether the district court has discretion to decide whether the actual sentence for the predicate offense must be increased for offense conduct separately addressed under Section 924(c).

F. Section 924(c) Does Not Restrict The Information Available To A Sentencing Judge But Does Limit How That Judge May Exercise Sentencing Discretion

Petitioner argues that a sentencing judge may nevertheless reduce the sentence for a predicate offense

based on the length of Section 924(c)'s mandatory prison term because, petitioner contends, prohibiting the judge from considering the length of that prison term would impermissibly limit the traditionally broad scope of information that a district court may consider when imposing a criminal sentence. Br. 2, 7-8, 19-21, 31-32 (relying upon 18 U.S.C. 3661 and *Pepper*, 562 U.S. 476). That argument is doubly flawed.

First, the government does not contend that a district court must blind itself to any relevant facts, nor does it argue that Section 3661 allows information to be excluded from the court's consideration. It is unclear whether Section 3661's reference to information concerning the "background, character, and conduct" of a defendant, 18 U.S.C. 3661, encompasses statutorily mandated sentences that must be imposed on other counts of conviction. But regardless, a district court can consider the fact that a Section 924(c) conviction punishes firearms conduct when deciding whether to impose a firearms enhancement for the predicate offense. See pp. 43-44, *supra*. What the sentencing court may not do is reduce the term of imprisonment on the predicate offense based on its view that the *length* of the prison term for the Section 924(c) conviction, *when added* to a prison term for the predicate, would produce a *total, aggregate length* of imprisonment that is greater than necessary in light of the Section 3553(a) factors. Cf. 18 U.S.C. 3584(b).

Second, the sentencing court's lack of authority to reduce a sentence for the predicate offense in order to offset Section 924(c)'s mandatory minimum does not derive from what type of information the court may consider. Rather, it derives from (1) the statutory provisions governing the court's imposition of the

particular term of imprisonment for that predicate and (2) the distinct provisions governing the total, aggregate length of imprisonment for multiple offenses. See pp. 21-29, *supra*. Just as a court cannot alter a statutorily mandated five-year sentence by considering more types of "information," neither can it reduce the length of a baseline term of imprisonment for the predicate offense in order to offset the fact that Section 924(c) imposes a mandatory-minimum sentence.

G. The Aggravated Identity Theft Provisions in Section 1028A Do Not Shed Reliable Light On The Meaning Of Section 924(c)

Finally, petitioner contends (Br. 24-25, 28) that the aggravated identity-theft statute codified at 18 U.S.C. 1028A shows that Congress has elsewhere adopted language prohibiting a sentencing court from "consider[ing] the effect of an additional mandatory minimum sentence when determining the proper sentence for the underlying conviction." Br. 28. Because Section 924(c) lacks similar text, petitioner asserts (Br. 24-25), Section 924(c) should be understood to allow a judge to reduce the term of imprisonment for the predicate offense in order to offset the impact of Section 924(c)'s consecutive term of imprisonment. That is incorrect. Section 1028A's prohibition serves a function distinct from and broader than that served by Section 924(c)'s sentencing provisions. In any event, Congress passed Section 1028A in 2004 in a separate enactment decades *after* the 1984 amendments that established Section 924(c)'s current sentencing framework. The subsequent passage of Section 1028A is an unreliable guide for inferring Congress's much earlier intent underlying Section 924(c).

1. Several aspects of Section 1028A are similar to Section 924(c), which plainly served as a starting point for the later enactment. In language that parallels Section 924(c), Section 1028A makes it unlawful to engage in identity theft "during and in relation to" certain predicate felony offenses and directs that the sentencing court shall impose a fixed, two-year prison term "in addition to," and consecutively with, "the punishment provided for [the predicate offense]." 18 U.S.C. 1028A(a)(1) and (b)(2). But unlike Section 924(c), the statute further provides that "a court shall not *in any way reduce* the term [of imprisonment] to be imposed for [the predicate] crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for [the identify-theft offense]." 18 U.S.C. 1028A(b)(3) (emphasis added).

That additional restriction in Section 1028A imposes a more significant limit on the discretion of a sentencing judge than Section 924(c). When a defendant has been convicted of both a Section 924(c) offense and a predicate offense, the sentencing judge has discretion to impose a prison term for the predicate that is lower than the sentence that the judge might have imposed in the absence of a Section 924(c) conviction for one particular reason: to account for the fact that Congress has already provided a sanction in Section 924(c) for the act of using, carrying, or possessing a firearm in connection with the predicate offense. See pp. 43-44, *supra*. The judge may therefore exercise discretion, when setting the specific term of imprisonment for the predicate offense, not to impose a firearm enhancement that would otherwise increase the separate term of imprisonment for that

predicate. See Sentencing Guidelines § 2K2.4, comment. (n.4 & backg'd) (recommending this course). By contrast, under the expansive text of Section 1028A(b)(3), the judge would be prohibited from considering that factor in its decision.

2. In any event, the language that Congress adopted in 2004 in Section 1028A is not a reliable guide for inferring the intent of a different Congress decades earlier in a different enactment.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted). The logical force of that general principle, however, is diluted when the language compared was enacted in different statutes at different times by different Congresses. Even in different parts of the same statute, Congress may convey the same concept using different language. See, *e.g.*, *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001). And here, the language that petitioner identifies in Section 1028A, which carries a different and much broader prohibition than the sentencing provisions within Section 924(c), was enacted decades after Section 924(c)'s relevant sentencing provisions took shape. For the reasons previously discussed, when Section 924(c)'s text is read in context and in light of the sentencing provisions of the Sentencing Reform Act, Congress sufficiently expressed its intent to prohibit courts from zeroing out Section 924(c)'s additional punishment by reducing the sentence for a predicate offense.

Equally important, petitioner has failed to identify a plausible non-superfluous interpretation for Section 924(c)'s use of the phrase "in addition to the punishment provided [for the predicate offense]," 18 U.S.C. 924(c)(1)(A), and its distinct prohibition against running Section 924(c)'s term of imprisonment "concurrently" with any other term of imprisonment, 18 U.S.C. 924(c)(1)(D)(ii). His view would negate, rather than recognize, the distinctive sentencing relationship of the combination-crime that Congress proscribed in Section 924(c). That failure provides additional reason to reject petitioner's position.[9]

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[9] As a final submission, petitioner invokes (Br. 32-34) the rule of lenity. That invocation is misplaced. The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citations and internal quotation marks omitted). As this Court has explained when construing Section 924(c), neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (citations and internal quotation marks omitted); see *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). Because petitioner's position cannot be squared with the text and structure of Section 924(c), as informed by the provisions of the Sentencing Reform Act, the rule of lenity has no application here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 924(c) (Supp. IV 1968) provided:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

2. 18 U.S.C. 924(c) (1970) provided:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more

than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

3. 18 U.S.C. 924(c) (Supp. II 1984) provided:

(c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

4. 18 U.S.C. 924(c) provides in pertinent part:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short barreled rifle, short barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

* * * * *

5. 18 U.S.C. 1028A provides in pertinent part:

Aggravated identity theft

(a) OFFENSES.—

(1) IN GENERAL.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) TERRORISM OFFENSE.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

* * * * *

6. 18 U.S.C. 3551 provides in pertinent part:

Authorized sentences

(a) IN GENERAL.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) INDIVIDUALS.—An individual found guilty of an offense shall be sentenced, in accordance with the pro-visions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section

3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

* * * * *

7. 18 U.S.C. 3553 provides in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * * *

8. 18 U.S.C. 3582 provides in pertinent part:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

* * * * *

---

[1] So in original. The period probably should be a semicolon.

9. 18 U.S.C. 3584 provides:

Multiple sentences of imprisonment

(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

10. 18 U.S.C. 3661 provides:

Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

RECORD AND BRIEF

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Supreme Court of the United States

LEVON DEAN, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The government sets forth a theory of § 924(c) and the Sentencing Reform Act that is atextual, inconsistent, and unrealistic.

The government's position is atextual because it reads into both statutes a mandate to impose a predicate sentence "that would be appropriate" in a hypothetical world where "the defendant [is] not also subject to punishment under Section 924(c)." Resp't Br. 13. But neither statute says that—which becomes all the more clear when they are compared to other provisions that do impose such limits. Accordingly, the government's position rests less on the statutory text and more on its view of Congress's purpose. But purpose-based efforts to impose atextual limits on sentencing discretion are "impermissibl[e]." *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

The government's position is inconsistent because it offers an inexplicable exception to its own reading of the statute: A district judge *can* "account for" the defendant's § 924(c) sentence by (as the Sentencing Guidelines recommend) declining to impose a weapons enhancement for an underlying offense. Resp't Br. 47. But the government has no theory of § 924(c)'s text that would allow a district judge "to account for" a § 924(c) sentence *only* in this way. If the government's reading of § 924(c) were correct, this practice would be unlawful and the Guideline recommendation would be invalid. Nor can the government's rule explain its practice of arguing in cases remanded for resentencing that a district court can increase the predicate sentence if the § 924(c) conviction was vacated on appeal.

The government's position is unrealistic because it depends on an artificial conception of the sentencing

process in which a district judge attempts to apply *some* of the § 3553(a) factors to each count individually, while ignoring overarching factors pertinent to the other counts and their sentences. But it is impossible to apply "the factors set forth in section 3553(a)," § 3582(a), "in light of all the circumstances of the case," § 3551(a), and based on all relevant information, § 3661, without considering how long the defendant will actually spend in prison. That is true when a court exercises discretion to set the aggregate sentence under § 3584 (which § 924(c) forecloses), but it is also true when the court imposes sentence for a single count under § 3582—which § 924(c) leaves untouched.

The government tries to reframe Mr. Dean's argument as seeking a novel "regime" in which judges routinely "zero[ ] out" underlying sentences to a single day. Mr. Dean's position is far more modest: A judge can and should give at least some consideration to the effect of a mandatory § 924(c) sentence when imposing sentence on the underlying offense. The result of that process will necessarily depend on the exercise of the judge's discretion "in light of all the circumstances of the case." § 3551(a).

I. SECTION 924(c) SAYS NOTHING ABOUT THE LENGTH OF THE UNDERLYING SENTENCE.

1. The government adds a crucial phrase to § 924(c) that Congress did not use. Where the statute says "the punishment provided for such [a predicate] crime of violence or drug trafficking crime," the government reads this: "The 'punishment provided for such [a predicate] crime of violence or drug trafficking crime' *in the absence of a Section 924(c) conviction*." Resp't Br. 17 (alteration in original) (citation omitted) (emphasis added). But "Congress did not write the stat-

ute that way." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Rather, Congress stopped after "punishment provided," and thus § 924(c) "takes it as given that the proper scope of punishment for a defendant's underlying crime is '*provided*' by some other lawful source"—namely, the underlying-offense statute and the Sentencing Reform Act. *United States* v. *Smith*, 756 F.3d 1179, 1185 (10th Cir. 2014); see Pet'r Br. 11–21.

Consequently, when § 924(c) instructs that its sentence be imposed "in addition to"—or, in the government's formulation, "over and above," Resp't Br. 16—"the punishment provided" for the predicate offense, it simply means the sentence must be imposed independently of and atop whatever punishment is lawfully imposed for the underlying conviction. The government insists that the phrase "in addition to" must do more than "merely instruct a sentencing judge to impose a separate sentence," *id.*, but that is precisely what it does. As part of the passage that sets forth the "distinctive 'combination' offense" that § 924(c) punishes, *id.* at 17, the "in addition to" clause clarifies that § 924(c) does not create a sentencing enhancement for the predicate crime, but rather, in Senator Mansfield's words, makes the "carrying of a gun in the commission of a crime a crime in and of itself," which carries a separate punishment. 116 Cong. Rec. 42150 (1970). That § 924(c) describes its sentence as being "in addition to *the punishment*" for the underlying offense simply reflects that the criminal code typically defines offenses by how they may be punished.

Section 3551 uses "in addition to" in precisely this way. A court may impose a financial penalty "in addition to any other sentence." § 3551(b). This language is not understood to say anything about what the

"other sentence" must be; it simply authorizes multiple, separate punishments. The same language in § 924(c) has "the same meaning." See *Smith* v. *City of Jackson* 544 U.S. 228, 233 (2005).

The government similarly claims that its reading of "in addition to" is necessary to avoid redundancy with § 924(c)'s ban on concurrent sentences. See Resp't Br. 16, 49. Not so. The "in addition to" clause confirms that § 924(c) creates a distinct offense punishable by a distinct sentence, while the concurrent-sentence ban prescribes the relationship between that distinct sentence and "any term of imprisonment imposed for" the predicate offense. § 924(c)(1)(D)(ii). Neither provision is rendered superfluous by this reading. It is, rather, the government's view that causes redundancy: If the "in addition to" clause actually required a § 924(c) sentence to be imposed "over and above" the punishment that would apply "in the absence of a Section 924(c) conviction," Resp't Br. 17, a concurrent sentence necessarily would be impermissible, because it would "offset the full impact" of the § 924(c) sentence, *id.* at 14.

Indeed, that § 924(c)(1)(D)(ii) refers explicitly to "any term of imprisonment imposed for" the underlying offense without mentioning the *length* of that term militates against the government's interpretation. This silence is particularly telling in light of the statute's separate probation restriction, which provides that "a court shall not place on probation any person convicted of a violation of this subsection." § 924(c)(1)(D)(i). The government opines that this restriction applies not only to the § 924(c) charge but also to the underlying offense. Resp't Br. 19 n.2, 37. Assuming that is correct, it only underscores that Congress did not impose an equivalent restriction on *the duration of imprisonment* for the predicate of-

fense. Indeed, the probation restriction's much broader language—which focuses on the overall punishment of the "person"—contrasts sharply with the language on which the government relies, which addresses only the sentence for the § 924(c) charge.

The government nevertheless asserts that § 924(c) will have no "practical force" unless the Court adopts its reading. Resp't Br. 17. Yet § 924(c) creates a distinct offense punishable by a separate, mandatory, consecutive sentence. The statute has ample "practical force," as Mr. Dean's mandatory 30-year sentence attests.[1]

2. The government's reading of § 924(c) also cannot explain the government's own position in this Court or in other cases.

Despite insisting that § 924(c) requires the imposition of an underlying sentence "that would be appropriate if the defendant were not also subject to punishment under Section 924(c)," Resp't Br. 13, the government says a sentencing judge *can* decline to apply a weapons enhancement for an underlying offense "to account for the fact that Congress has already provided a sanction in Section 924(c) for" using or carrying a gun during a predicate offense, *id.* at 47.

This argument shows just how far the government has departed from § 924(c)'s language. Having read into § 924(c) a restriction that is not there—*a judge may not account for a § 924(c) sentence in setting the underlying sentence*—the government is now forced to

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[1] The government's claim that the rule of lenity has "no application" here, Resp't Br. 49 n.9, is belied by the fact that its argument requires injecting tremendous meaning into the innocuous phrase "in addition to." *Cf. Whitman* v. *Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). This is just the type of case where the rule of lenity applies. Pet'r Br. 32–34.

read a caveat into its invented restriction: . . . *except to avoid double-counting by virtue of a weapons enhancement*. The government notes that the Guidelines support this approach, Resp't Br. 43–44, but it never explains where *in the statute* it finds the authority to "account for" the § 924(c) sentence *only* in this way. Indeed, if the government's reading of § 924(c) were correct, the statute would flatly prohibit a judge from declining to impose a weapons enhancement "for [the] particular reason" of the § 924(c) sentence, *id.* at 47, because (in the government's view) a district judge must determine the underlying sentence as "if the defendant were not also subject to punishment under Section 924(c)," *id.* at 13, "even when the predicate-offense statute . . . itself includes a weapons-based sentencing enhancement," *id.* at 18–19; see *Smith*, 756 F.3d at 1188.

The government also cannot explain its practice of arguing in other cases that sentencing courts can and do account for the § 924(c) sentence. A district judge will sometimes impose a modest underlying sentence in light of the § 924(c) sentence, only to see the § 924(c) conviction overturned on appeal. In this scenario, the government has repeatedly argued, and courts have agreed, that it is proper for the district court to impose a higher underlying sentence on remand precisely to account for the absence of the § 924(c) sentence. See *id.* at 1188–89 & nn. 5–6 (collecting cases). But this argument necessarily assumes that the district court initially and properly accounted for the § 924(c) sentence by imposing a lower sentence than it otherwise would have. The government makes no effort to explain why it is permissible to consider a § 924(c) sentence whenever it helps the prosecution but not when it helps the defendant.

3. Section 924(c)'s language contrasts starkly with that of § 1028A. As the government acknowledges, § 924(c) "served as a starting point for" the "parallel[ ]" language in § 1028A, which likewise requires a fixed term of imprisonment "'in addition to,' and consecutively with," the sentence for the underlying offense. Resp't Br. 47. But § 1028A also contains language that is missing from § 924(c): "a court shall not in any way reduce the term to be imposed for [the predicate] crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for" a § 1028A violation. § 1028A(b)(3).

The government attempts to explain away this key difference between these otherwise-parallel provisions by arguing that § 1028A imposes a "more significant limit" on the sentencing judge's discretion. Resp't Br. 47. As just explained, the government says a court may decline to apply a weapons enhancement on an underlying offense "to account for" a § 924(c) sentence. *Id.* The government claims this discretion is lacking under § 1028A because Congress meant that provision to prohibit a district court from accounting for the mandatory consecutive sentence "in any way"—this difference, according to the government, explains the more restrictive language in § 1028A. *Id.* at 47–48.

This explanation fails because it cannot be squared with the government's own reading of § 924(c). As explained above, a straightforward application of the government's rule would preclude any exception for weapons enhancements, see *supra* p. 6, leaving no difference in meaning between § 924(c) and § 1028A that could account for their significant differences in language.

Regardless, it is not plausible that all of the additional language in § 1028A is intended merely to ensure that a judge must apply an identity-theft-based sentencing enhancement even when it would duplicate § 1028A's mandatory penalty. While it is true that Congress "may convey the same concept using different language" in different statutes, Resp't Br. 48 (citing *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001)), the differences between § 924(c) and § 1028A go well beyond "us[ing] synonyms" to describe the same idea, see *Tyler*, 533 U.S. at 664. Section 924(c) does not merely contain a narrower restriction on "tak[ing] into account" the mandatory sentence, § 1028A(b)(3); it contains no such restriction at all. This significant difference invokes the strong presumption "that Congress acts intentionally and purposely" when it uses different language in similar provisions. *Russello*, 464 U.S. at 23 (citation omitted). "Had Congress intended to restrict" the sentence for a § 924(c) predicate, "it presumably would have done so expressly as it did in" § 1028A. *Id.*; see also *Rodriguez*, 480 U.S. at 525 (declining to read 18 U.S.C. § 3147 to bar suspended sentences where Congress amended other provisions, but not § 3147, to do so expressly); Pet'r Br. 25.

The temporal gap between § 924(c)'s relevant amendments and § 1028A's enactment does not "dilute[]" the force of this presumption. Resp't Br. 48. Congress has frequently amended § 924(c), including to add a new mandatory minimum provision (for armor-piercing ammunition) shortly after § 1028A was adopted in 2004.[2] It easily could have amended § 924(c) to impose the same type of restriction as § 1028A, but it did not. Cf. *Rodriguez*, 480 U.S. at

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[2] Pub. L. No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); *see also, e.g.*, Pub. L. No. 109-304, § 17(d)(3), 120 Stat. 1485, 1707 (2006).

525. In any event, the "axiom[ ] that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning," *Smith*, 756 F.3d at 1186, has never been limited to statutes enacted contemporaneously, *e.g.*, *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 485 (1996) (construing RCRA by comparison to the later-enacted CERCLA, which was "designed to address many of the same . . . problems").

4. The government's position here resembles its unsuccessful argument in *Rodriguez*. There, the Court considered 18 U.S.C. § 3147, which was, like relevant portions of § 924(c), enacted through the Comprehensive Crime Control Act of 1984. At the time, § 3147 imposed a two-to-ten-year sentence on anyone who committed an offense while on pretrial release "*in addition to* the sentence prescribed for the [underlying] offense." 480 U.S. at 523 n.1 (emphasis added). The government argued that a sentence imposed under § 3147 could not be suspended because the statute reflected Congress's intent to impose an "an additional period" of "mandatory" incarceration. *Id.* at 524–25. The Court rejected that view, explaining that suspended sentences were authorized unless otherwise specifically prohibited, and "[n]othing in the language" of § 3147 was "irreconcilable" with that general power. See *id.* at 524. The Court also warned against relying on the Crime Control Act's perceived purpose of "diminishing the sentencing discretion of judges," explaining that "no legislation pursues its purposes at all costs." *Id.* at 525–26.

Here too, "[n]othing in the language" of § 924(c) explicitly abrogates a sentencing judge's duty to impose an underlying sentence sufficient but not greater than necessary to serve § 3553(a)'s purposes. See *infra* pp. 12–15. And here too, it would be wrong to go

beyond the language of the statute simply because the government claims it would serve Congress's perceived purpose. See Pet'r Br. 26.

The government ignores *Rodriguez*, instead invoking *Abbott* v. *United States*, 562 U.S. 8 (2010), and *United States* v. *Gonzales*, 520 U.S. 1 (1997). *Abbott* held that a defendant is "not spared from [the § 924(c)] sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." 562 U.S. at 13. *Gonzales* held that § 924(c)'s concurrent-sentence ban reaches state as well as federal sentences. 520 U.S. at 5. In neither case did the Court consider the defendants' underlying sentences.

Because it cannot rely on the inapposite holdings of these cases, the government instead repeatedly invokes *Abbott*'s observation that the "'longstanding thrust' of Section 924(c) is 'its insistence that sentencing judges impose *additional* punishment for § 924(c) violations.'" Resp't Br. 13 (quoting 562 U.S. at 20) (emphasis in original); see *id.* at 8, 18, 38. The government similarly points to *Gonzales*'s caution that "it is not for the courts to carve out statutory exceptions [from § 924(c)] based on judicial perceptions of good sentencing policy." 520 U.S. at 10.

Nothing in Mr. Dean's arguments is inconsistent with this "thrust," because a sentencing court must impose the §924(c) sentence in addition to whatever sentence the court, in the lawful exercise of its statutory discretion, imposes for the underlying crime. In any event, Congress does not legislate in "thrust[s]"; it uses words. And as explained above, the "straightforward statutory command" of § 924(c), *id.* at 6, precludes the government's tortured construction. It is therefore the government that seeks to "carve out statutory exceptions based on [its] perceptions of good

sentencing policy." *Id.* at 10. See also *Rodriguez*, 480 U.S. at 525.

Finally, the government makes much of Congress's abrogation of *Busic* v. *United States*, 446 U.S. 398 (1980), which held that § 924(c) did not apply to any predicate offense "which itself authorizes enhancement if a dangerous weapon is used." *Id.* at 399. Congress reversed that judgment in 1984 by clarifying that § 924(c) applies even if the predicate "provides for an enhanced punishment" for weapons use. § 924(c)(1)(A). In the government's view, this shows Congress's intent to impose additional punishment in all cases. Resp't Br. 18–21.

The issue here, however, is different. *Busic* carved out an entire category of predicate offenses to which § 924(c) could not apply at all, some of which (including the statute at issue in *Busic*) carried no minimum penalty for gun use. See § 111(b). *Busic* thus made it possible for a defendant to receive *no* punishment specifically for using a gun during a crime—a far cry from Mr. Dean's 30-year mandatory sentence. Congress's decision to close that loophole did nothing to restrict a sentencing judge's statutory discretion as to an underlying offense to which a § 924(c) sentence will definitely attach.

II. THE SENTENCING REFORM ACT'S PARSIMONY REQUIREMENT CANNOT BE APPLIED PIECEMEAL.

1. The government asserts that the Sentencing Reform Act creates a rigid, artificial process in which a district court sentencing for multiple offenses: (1) determines under § 3582 the appropriate sentence for each count, based on the § 3553(a) factors, as though no other counts existed; and then (2) determines under § 3584 whether the resulting sentences should be

consecutive, concurrent, or overlapping, again based on the § 3553(a) factors. See Resp't Br. 21–22. On this view, the first step is a largely hypothetical exercise; the district court must apply the § 3553(a) factors to each count individually, with the judge pretending (or trying to pretend) that she does not know the defendant will be sentenced for the other counts as well. The real action happens at the second step, when the judge sets the aggregate sentence by deciding whether the individual sentences are consecutive, concurrent, or overlapping. And, says the government, because § 924(c) withdraws the usual discretion at step two, a judge in a § 924(c) case has no power to influence the aggregate sentence in an effort to comply with § 3553(a). *Id.* at 26–28.

As an initial matter, the government attacks a straw man. It accuses Mr. Dean of arguing that, despite § 924(c)'s withdrawal of a judge's discretion under § 3584, the judge can still "determine th[e] total, aggregate [sentence] based on the judge's consideration of the Section 3553(a) factors." *Id.* at 28. That is not Mr. Dean's position. Rather, his argument is that § 924(c) leaves untouched a judge's discretion to set the sentence for the underlying count under § 3582, *supra* pp. 1–11, and it is impossible to conduct that exercise in compliance with §§ 3582 and 3553(a) without giving at least some thought to how long the defendant will ultimately spend in prison. See Pet'r Br. 11–18. That is, because the judge "shall consider the factors set forth in section 3553(a)" in determining the underlying sentence, § 3582(a), and because the § 3553(a) factors relating to public safety, general and specific deterrence, and rehabilitation require some consideration of the aggregate sentence, a judge may consider the fact of a § 924(c) sentence under § 3582.

The government never confronts this argument directly, instead contending that the court must consider "'the need for the sentence imposed' 'to reflect the seriousness of *the* offense' at issue and 'to provide just punishment for *th*[*at*] offense.'" Resp't Br. 29 (quoting § 3553(a)(2) (emphasis added)). While it is true that some of the § 3553(a) factors refer to "the offense," which the government interprets narrowly based on the use of the definite article, other § 3553(a) factors are not so narrowly drawn.

For example, a judge imposing a sentence for one of multiple counts must consider the other counts in order to apply coherently § 3553(a)(2)(C)'s instruction to "impose a sentence sufficient, but not greater than necessary . . . to protect the public from further crimes of the defendant." As Mr. Dean explained, a judge cannot determine what sentence *for the underlying offense* satisfies this criterion without "giv[ing] at least some consideration to the total amount of time th[e] defendant will spend in prison." *United States* v. *Franklin*, 499 F.3d 578, 587 (6th Cir. 2007) (Moore, J., concurring); Pet'r Br. 15–16. The same is true of the need "to promote respect for the law," § 3553(a)(2)(A); "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B); and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," § 3553(a)(2)(D). None of these factors focuses only on "the offense," and they require a judge to bear in mind that the defendant will already serve a substantial mandatory sentence under § 924(c). See Pet'r Br. 14–18.

Thus, § 3582 commands a district judge imposing a sentence for a single count to consider some circumstances beyond "the offense" itself, including the sentences arising from the other counts. And § 3551 rein-

forces that command: "[A] defendant . . . shall be sentenced . . . so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable *in light of all the circumstances of the case.*" § 3551(a) (emphasis added). That is why "a sentencing judge does not merely evaluate the gravity of each separate crime upon which a conviction was obtained, and then select a punishment that would be appropriate for each if considered independently of any other crimes." *United States* v. *Bay*, 820 F.2d 1511, 1514 (9th Cir. 1987). And that is why "sentencing courts routinely consider . . . the impact of a sentence already issued for one count of conviction when trying to determine the appropriate punishment under § 3553(a) for a related count of conviction." *Smith*, 756 F.3d at 1183 & n.1 (collecting cases).[3]

The government falls back to quotations from the 1983 Senate Report. Resp't Br. 21–26. In context, however, these snippets do not support the notion that a sentencing judge must impose a sentence for each count that ignores the other counts and their sentences. The passage the government quotes at pp. 21–22 does not even address §§ 3582 and 3584, much less § 3553; in explaining the duties of the Sentencing Commission under 28 U.S.C. § 994, it simply expresses the "intent that, to the extent feasible," sentences for "multiple offenses" be determined sepa-

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[3] The government says a one-day sentence could never reflect the seriousness of an underlying offense standing alone, Resp't Br. 29, but that is a wholly separate question from whether § 3582 authorizes a court to *consider* a § 924(c) sentence. If the government believes a particular sentence does not properly comply with § 3553(a) "in light of all the circumstances of the case," § 3551(a), it can appeal, *United States* v. *Booker*, 543 U.S. 220, 261 (2005).

rately and the degree to which they should overlap be specified," so that if one conviction is reversed, "it will be unnecessary to recalculate the sentence." S. Rep. 98-225, at 176–77, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3359–60. This tidbit of legislative history cannot overcome "a sentencing judge's overarching duty under § 3553(a)," *Pepper* v. *United States*, 562 U.S. 476, 491 (2011), to "impose a sentence" for the underlying offense that is "sufficient, but not greater than necessary" to serve the Sentencing Reform Act's purposes.

2. The government says it "does not contend that a district court must blind itself to any relevant facts," and thus § 3661—which bars the "limitation" of "information" that a sentencing court "may receive and consider"—is irrelevant. Resp't Br. 45. In practice, however, that is precisely what the government demands: It says that both § 924(c) and the Sentencing Reform Act require a judge imposing an underlying sentence to disregard the § 924(c) conviction when conducting the § 3553(a) inquiry. *E.g.*, Resp't Br. 13 (court must impose an underlying sentence "that would be appropriate if the defendant were not also subject to punishment under Section 924(c)"). The government's position thus requires sentencing judges to "studiously ignore one of the most conspicuous facts about a defendant"—the minimum sentence he will serve. *Smith*, 756 F.3d at 1180. That cannot be squared with § 3661.

III. NOTHING IN THE LEGISLATIVE HISTORY SUGGESTS THAT CONGRESS INTENDED TO BAR COURTS FROM CONSIDERING A § 924(c) SENTENCE.

The government wades through reams of legislative history, Resp't Br. 29–36, to show that Senator Mans-

field particularly and Congress generally sought to amend § 924(c) to impose a "mandatory" sentence "solely for [the criminal's] choice to use a gun," *id.* at 31 (quoting 1969 Senate Hearings). But that basic point is uncontroverted. See Pet'r Br. 30. And Representative Poff's objective was the same. His bill included a "minimum mandatory sentence" intended to warn a would-be criminal that, "if he uses his gun" during a crime, then "he is going to jail." 114 Cong. Rec. 22231 (1968). That is why his bill completely prohibited probation, suspension, and a concurrent sentence. *Id.* And yet Representative Poff understood that these restrictions would *not* limit the district judge's usual discretion as to the "basic felony." *Id.* at 22237. Although the bill as enacted originally lacked these stricter elements, Senator Mansfield and others soon led the charge to restore them. Pet'r Br. 30.

Senator Mansfield's bill thus made "two major" changes to § 924(c). 115 Cong. Reg. 29461 (1969). First, "[u]nder no circumstances" could the 924(c) sentence "be suspended or assessed concurrently." *Id.* Second, a subsequent § 924(c) conviction would be punished with a twenty-five year mandatory prison term. *Id.* Notably, Senator Mansfield did not mention his amendment's "in addition to the punishment provided" language as a "major" change. See *id.* That omission is especially telling given that, in 1970, district judges still "exercised 'almost unfettered discretion' to select prison sentences." *Tapia* v. *United States*, 564 U.S. 319, 323 (2011). It would therefore have been remarkable for Congress to impose a restriction as unusual as the one the government proposes without it eliciting any commentary from its sponsor, much less to do so in such innocuous language.

If anything, the legislative history suggests that Senator Mansfield included this language only to underscore that § 924(c) made the "carrying of a gun in the commission of a crime a crime in and of itself" and to emphasize the ban on concurrent sentences. 116 Cong. Rec. 42150 (1970). The 1971 amendments thus left intact the sentencing judge's discretion as to the term of imprisonment for the "basic felony."

After exhausting decades of legislative history, the government points to only one instance in which Congress even arguably altered § 924(c) to limit a judge's normal range of sentencing discretion as to the *underlying* conviction: the 1984 amendment's clear prohibition on suspension, probation, or parole, which the government argues applied not only to the § 924(c) sentence but also the underlying sentence. Resp't Br. 37. As explained above, however, even if the government is right about the scope of these prohibitions, that supports Mr. Dean's position. Congress's decision to "express[ly]" alter a statutory regime to address one issue (here, suspension, probation, and parole for the underlying offense) while maintaining "silence" as to a related issue (the length of a term of incarceration for the underlying offense) indicates that Congress "did not intend" to legislate as to the latter issue. See *Wyeth* v. *Levine*, 555 U.S. 555, 574–75 (2009); *supra* pp. 6–7.[4]

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[4] As the government notes, Resp't Br. 35 n.7, Congress abolished the authority to suspend sentences and grant parole as a general matter during its overhaul of sentencing in 1984. These two prohibitions thus are no longer part of § 924(c), but the ban on probation is part of current § 924(c).

IV. MR. DEAN'S POSITION DOES NOT PRODUCE "ANOMALOUS" RESULTS BEYOND WHAT CONGRESS HAS DICTATED, BUT THE GOVERNMENT'S DOES.

1. The government misrepresents Mr. Dean's position while ignoring the troubling anomalies that spring from its own view. The government gives an example involving two defendants of differing culpability, one deserving two years in prison and the other deserving five, both of whom receive a mandatory five-year § 924(c) sentence. Resp't Br. 39. It contends that, under Mr. Dean's approach, a district judge should give both defendants five-year-and-one-day sentences, which would "perversely sanction the less culpable defendant much more severely." *Id.* at 40. But Congress has instructed district judges to "avoid unwarranted sentenc[ing] disparities[,]" § 3553(a)(6), and "a judge exercising discretion under [ ] § 3553(a) 'would [not] be *required* to sentence' a more culpable defendant to a lesser [or equal] term," *Abbott*, 562 U.S. at 22 (second alteration in original) (emphasis in original) (citation omitted). Here, for example, the district judge varied upward in the sentence for Mr. Dean's more culpable brother while varying downward in Mr. Dean's sentence. J.A. 50.

Moreover, even if a judge did conclude that § 3553(a) dictated identical underlying sentences for these defendants, that result would simply reflect that Congress has decided to treat all § 924(c) offenders the same way with respect to their gun use. All mandatory minimums have this "anomalous" feature. And the government's proposed solution strains credulity: The government would impose on *both* defendants a sentence that is greater than necessary.

That result is truly anomalous, and it has the further disadvantage of not being contemplated by statute.

2. The government says the "*only* apparent function" of Mr. Dean's position is to "frustrate[ ]" § 924(c)'s purpose by reducing "the predicate-offense sentence to a single day." Resp't Br. 40–41 (emphasis in original). But the "function" of Mr. Dean's argument is to permit sentencing judges to comply with "Congress' express directives in §§ 3661 and 3553(a)," *Pepper*, 562 U.S. at 480, by considering all relevant information and imposing "a sentence [that is] sufficient, but not greater than necessary," § 3553(a).

Likewise, the government's repeated invocation of a "one-day" sentencing regime is a distraction. Mr. Dean does not claim that in all or even in most cases a § 924(c) defendant should receive a one-day sentence for his underlying offense. Mr. Dean merely asks that a § 924(c) sentence be allowed to "bear legitimate relevance to the sentencing considerations" Congress established in § 3553(a). *Smith*, 756 F.3d at 1192. Here, the district judge believed a one-day predicate sentence would be appropriate based on Mr. Dean's relatively limited culpability and criminal history and his mandatory 30-year § 924(c) sentence. J.A. 25–26. In other cases, a longer sentence will suit.

V. THE GUIDELINES RECOGNIZE A SENTENCING COURT'S ABILITY TO ACCOUNT FOR A § 924(c) SENTENCE.

1. The Sentencing Guidelines reflect the necessity of considering punishment in the aggregate. In the case of multiple counts generally, the Guidelines instruct courts to group together "[c]losely [r]elated" counts for a single combined offense level and to count multiple groups with incremental increases to a single combined offense level. See U.S.S.G. §§ 3D1.2,

3D1.4. When one of the multiple counts is a consecutive mandatory minimum under § 924(c), certain Guidelines treat that count as part of an aggregate sentence. In the case of career offenders, the Guidelines instruct the district court to calculate an aggregate range under § 4B1.1(c) either by adding the § 924(c) mandatory minimum to the otherwise applicable career offender range for the other counts or by reference to a special table setting out ranges for the § 924(c) count, and to use whichever range is higher for the combined counts. U.S.S.G. § 4B1.1(c)(2), (c)(3). The Guidelines instruct the court to determine the appropriate sentence within that aggregate range, and then "apportion[ ]" that aggregated sentence among all the counts of conviction "to the extent possible." U.S.S.G. § 4B1.1 cmt. (n.3(D)); *id.* § 5G1.2(e) & cmt. n.4(A).

This is ordinarily achieved by imposing the mandatory minimum on the § 924(c) count, subtracting the mandatory minimum sentence from the combined sentence, and imposing the remainder as the sentence for the underlying count. See § 5G1.2 cmt. n.4(B)(i). In other words, the court is instructed to determine the appropriate sentence for all the counts in the aggregate, and then work backwards to comply with the statutory requirements. In this way, the sentence for the underlying count *necessarily* accounts for the § 924(c) sentence.

2. The government invokes two specific Guidelines provisions, but it misapprehends both.

The government first asserts that § 5G1.2(a) directs judges to impose underlying sentences "independently" from § 924(c) sentences. Resp't Br. 42–43. But, as Mr. Dean explained, that position is backwards. Rather than requiring an underlying sentence to be imposed independently of a mandatory minimum sen-

tence, § 5G1.2(a) requires the mandatory minimum sentence to be imposed independently of the underlying sentence. See Pet'r Br. 37–38. The government has offered no response to this point.

Second, the government invokes § 2K2.4. Resp't Br. 43–44. But this provision "expressly state[s] that a § 924(c) sentence *should* influence (and serve to reduce) a sentencing court's calculation of the guidelines range for the underlying offense." *Smith*, 756 F.3d at 1188 (emphasis in original). It advises courts not to apply a weapons enhancement to the underlying offense in order to "avoid double counting" with the § 924(c) sentence. § 2K2.4 n.4 & backg'd. If that is permissible—and the government agrees that it is, although it cannot explain why, Resp't Br. 43–44, 47–48—then a district judge can consider a § 924(c) sentence when setting the sentencing for the underlying felony. Conversely, if the government's reading of § 924(c) were correct, § 2K2.4's recommendation would be improper. *Smith*, 756 F.3d at 1188.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below and order the case remanded for resentencing.

Respectfully submitted,

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In the Supreme Court of the United States

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE*

Amici curiae are the National Association of Criminal Defense Lawyers (NACDL) and Families Against Mandatory Minimums (FAMM).

* Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner's consent to the filing of amicus briefs is filed with the Clerk. Amici received respondent's consent to file this brief by letter and have filed that letter with the Clerk.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a membership of many thousands of direct members and up to 40,000 affiliated members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance to courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

FAMM is a national, nonprofit, nonpartisan organization of approximately 68,000 members. FAMM was founded in 1991 to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences, FAMM illustrates the human face of sentencing as it advocates for federal and state sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings, including many in this Court.

Amici believe that the punishment imposed must always fit the crime—and the offender. Thus, amici promote sentencing policies that give judges principled discretion to consider the fullest information possible about the defendants before them. Amici aspire to a nation in which sentencing is individualized and humane—and sufficient but not greater than necessary to impose

just punishment, secure public safety, and support the successful rehabilitation efforts of offenders.

The case of petitioner Lævon Dean, Jr. illustrates the reasons why judges must have wide discretion to consider all information about the defendants before them. Mr. Dean was convicted of conspiracy to commit robbery and robbery, in violation of 18 U.S.C. §§ 2 and 1951, and two counts of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), on the basis of aiding and abetting liability. Pet. App. 5, 11. The robberies were led by Mr. Dean's brother, who brought the firearms to the crime scenes and used them as clubs to strike the victims. Pet. App. 3. Mr. Dean, who had no violent criminal history, J.A. 26, was, in the words of the prosecutor, "not as culpable" and "a follower," J.A. 22–23. Nevertheless, because he was convicted of two § 924(c) counts, Mr. Dean received mandatory minimum consecutive sentences of 5 and 25 years, and thus will spend at least the next 30 years of his life in prison.[1] The district judge believed that sentencing Mr. Dean to 30 years and one day reflecting all counts was "*more than sufficient* for a sentence in this case." J.A. 26 (emphasis added). Consistent with the Eighth Circuit's decision in *United States* v. *Hatcher*, 501 F.3d 931 (8th Cir. 2007), *cert. denied*, 552 U.S. 1170 (2008), however, the district judge concluded that he was required to determine the robbery sentences in a vacuum and then tack the 30-year mandatory minimums on top. He therefore sentenced Mr. Dean to a total

[1] The two mandatory minimum sentences are not in dispute in this case.

of 400 months' imprisonment—40 months longer than the 30-year sentence he deemed more than adequate.

Petitioner's case is not unique. Thousands of individuals, including amicus FAMM's members and defendants represented by amicus NACDL's members, receive mandatory minimum sentences under § 924(c) each year.[2] As the result of decisions such as *Hatcher*, district judges are often forced to impose sentences on the underlying offenses they deem "unjust and unreasonable." *United States* v. *Roberson*, 573 F. Supp. 2d 1040, 1047 (N.D. Ill. 2008).

Consider, for example, the case of Gary Roberson. Mr. Roberson was convicted of bank robbery and brandishing a firearm in furtherance of a crime of violence, which carried an 84-month mandatory minimum sentence. *Id.* at 1041. The district judge determined that "a reasonable sentence for all of the charged conduct" was 85 months—which was the midpoint of the Guidelines range for bank robbery with an enhancement for brandishing a firearm. *Id.* at 1045. To effectuate that sentence, she imposed a one-month sentence on the underlying offense, and added an 84-month mandatory minimum sentence, to be served consecutively. *Ibid.* The U.S. Court of Appeals for the Seventh Circuit, however, reversed, following the same rationale as *Hatcher*. *See* 474 F.3d 432 (7th Cir. 2007). On remand, the district judge reiterated that "the sentence for this case as a whole, which best[] serves the § 3553(a) purposes, is the originally-imposed 85 months." 573 F. Supp. 2d at 1051. Following the Seventh Circuit's instructions, however,

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[2] *See, e.g.*, United States Sentencing Commission, *Quick Facts: Section 924(c) Firearms Offenses (2008–2012)* <http://tinyurl.com/924cFacts>.

she ignored the mandatory minimum, rendered a 36-month sentence on the underlying offense, and then added to it the 84-month mandatory minimum, with both sentences to run consecutively.

Amici appear in support of petitioner because the Eighth Circuit profoundly erred by prohibiting a sentencing judge's consideration of a mandatory non-concurrent sentence under § 924(c) when fashioning a sentence that is sufficient but not greater than necessary for the underlying offense. That "blinkered view," which the Tenth Circuit properly rejected in *United States* v. *Smith*, 756 F.3d 1179, 1180 (10th Cir. 2014), conflicts with centuries of traditional sentencing practices in the United States and a clear statutory command entrusting judges with significant discretion to consider the fullest information possible about the offenders before them. If this Court upholds the Eighth Circuit's misguided interpretation, district judges—like the one in this case—will be forced to continue imposing needlessly harsh sentences.

Amici submit this brief to underscore the enduring American tradition of informed and principled judicial discretion in criminal sentencing. In amici's view, a proper understanding of the different facets of judicial discretion, coupled with a close reading of the statutory language, is necessary to comprehend what § 924(c) requires—and what it does not. In addition, assuming *arguendo* a reasonable doubt as to the meaning of § 924(c), amici believe this case presents the Court with an opportunity to affirm the continuing vitality of the rule of lenity, particularly as applied to mandatory minimum sentencing provisions.

SUMMARY OF ARGUMENT

The history of federal criminal sentencing in the United States has included sometimes controversial shifts in the discretion granted to judges. But despite these ebbs and flows in the tides of judicial discretion, there has been one constant: Judges have always been entrusted with the power and duty to base their sentencing decisions on the fullest information possible concerning the cases and offenders before them. In light of the central role that judicial discretion has historically occupied in the sentencing context, this Court has repeatedly stated that it will not infer congressional intent to abrogate judicial discretion absent a clear statement to that effect. Congress itself has embraced that principle in the Sentencing Reform Act of 1984. Section 924(c) of Title 18, however, does not contain any such statement. Rather, § 924(c) means only what it says: A judge must sentence an offender to at least the mandatory minimum on that count, which may not run concurrently with any other term of the sentence. It does not require the judge to blind herself to the § 924(c) sentence when she imposes *other* sentences on the same offender.

I. Post-Revolutionary reformers reacted to the harshness of the British common law by embracing judicial discretion as a means of ensuring individualized punishment. Judges have long had discretion in deciding the term of a sentence, in structuring a sentence on multiple counts, and in considering all relevant information in arriving at the sentence. Modern reforms have limited some aspects of judicial discretion in sentencing in some cases, but Congress has not curtailed a judge's discretion to consider the fullest information possible concerning the defendant. On the contrary, Congress has repeatedly affirmed a judge's discretion to consider a wide spectrum of

information about the case and the offender, reflecting the settled principle that punishment must fit both the crime and the offender.

II. Because sentencing is a matter that has traditionally been committed to judicial discretion, sentencing statutes are interpreted in light of the common-law background against which they were enacted. This Court has long required that Congress provide a clear statement of intent to abrogate judicial discretion in sentencing. Because Congress knows how to direct sentencing practices in express terms, this Court is reluctant to infer meaning from legislative silence or ambiguity. Congress expressly incorporated this principle in the Sentencing Reform Act, when it instructed district judges to sentence defendants in accordance with the Act in all cases and in all respects "[e]xcept as otherwise *specifically* provided." 18 U.S.C. § 3551(a) (emphasis added).

III. Measured against this Court's clear-statement requirement and the requirements of § 3551(a), § 924(c) does not go as far as the Government asserts. Rather, the plain text of the statute establishes that § 924(c) requires only a mandatory sentence for each § 924(c) count, which may not run concurrently with any other sentence. The effect of § 924(c) is only to bar concurrent terms of imprisonment; it permits courts to impose *any* sentence on an underlying offense, and to consider all relevant factors in imposing that sentence. By contrast, in the aggravated identity theft statute, 18 U.S.C. § 1028A(b), Congress expressly directed sentencing courts *not* to take into account the mandatory minimum sentence in imposing a sentence on the underlying offense. That clear statement of intent to abrogate the common law practice is absent from § 924(c). A district court thus retains discretion to consider the consecutive § 924(c) sentence or sentences in

imposing a penalty for an underlying offense. Indeed, the court is obligated to do so pursuant to § 3553(a) if failing to consider the mandatory minimum would otherwise yield a sentence in the case as a whole that is greater than necessary. And, even assuming some ambiguity in the statutory language, the rule of lenity defeats the Government's interpretation.

ARGUMENT

I. JUDICIAL DISCRETION TO CONSIDER ALL INFORMATION ABOUT THE CASE AND THE OFFENDER IS A TIME-HONORED PRINCIPLE OF AMERICAN LAW

"For generations, legislatures have relied on individual judicial judgment to balance case-specific equities in order to impose a fair sentence." Reply Brief for the United States at 12, *Beckles* v. *United* States, No. 15-8544 (Nov. 2016). "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon* v. *United States*, 518 U.S. 81, 113 (1996); *accord Pepper* v. *United States*, 562 U.S. 476, 487–88 (2011). The commitment to respect and safeguard judicial discretion has become "one of the most powerful and pervasive doctrines in the law of sentencing." Arthur W. Campbell, *Law of Sentencing* § 9:3 (3d ed. West 2004).

The discretion vested in sentencing judges historically has manifested in three ways. *First*, judges historically have had discretion to sentence defendants to any term in prison and any amount in fines within limits established by Congress, most commonly in the form of statutory

maximums. *Second*, judges have had discretion to structure defendants' sentences as they see fit by determining whether a sentence would be served concurrently or consecutively with any other sentences imposed. *Third*, judges have had discretion to draw on whatever reliable information they deem relevant in determining the term and structure of defendants' sentences, subject only to certain constitutional constraints.

Although in recent years Congress has attempted to cabin the first two aspects of judicial sentencing discretion, it has not constrained the ability of judges to take account of all relevant information about a defendant. On the contrary, recognizing that this aspect of judicial discretion goes to the heart of the criminal law's ability to treat each defendant as an individual, Congress has expressly affirmed district judges' ability to consider the fullest information possible concerning the offenders before them.

A. Judicial Discretion Has Historically Been Understood as a Means of Ensuring Justice in Individual Cases

1. After the Revolutionary War, reform-minded legislators embraced greater judicial discretion as a means to temper the harshest aspects of sentencing under the common law. In 18th century England, death, not imprisonment, was the norm for punishing most felonies. *See* 4 William Blackstone, *Commentaries* *18–19 (discussing the "melancholy truth" that English law prescribed the death penalty for no fewer than 160 crimes). The list of crimes warranting capital punishment included felling trees in a park, setting a cornfield afire, sending threatening letters, destroying a turnpike gate, and shooting a rabbit. Campbell, § 1:2. For these offenses, the English (and colonial) judge's role was largely ministerial: Pronounce the sentence of death as mandated by the jury's

verdict. *See Apprendi* v. *New Jersey*, 530 U.S. 466, 479–80 (2000). By contrast, the common law of misdemeanors, though still harsh, afforded judges relatively more flexibility. For these offenses, "punishment was at the discretion of the justices [of the peace]." J. H. Baker, *An Introduction to English Legal History* 512 (4th ed. 2002). By the 18th century, judges usually chose among fines, whipping, and imprisonment. *Ibid.*

As early as the 1780s, American lawmakers began responding to criticism that their inherited criminal codes were too bloodthirsty and did not allow for the individualization of punishment. *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Val. U. L. Rev. 693, 696–98 (2005). Drawing inspiration from the work of philosophers and scholars such as Beccaria, Blackstone, and Bentham, reformers favored imprisonment within offense-specific limits set by legislators as a means of "securing a new and more rational and humane criminal jurisprudence." Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. Crim. L. & Criminology 35, 42 (1921). Thus, in 1789, the first criminal statute enacted by the First Congress provided that the defendant

> shall . . . be punished by fine or imprisonment, or both, in the discretion of the court . . . , so as the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months.

An Act to Regulate the Collection of the Duties, ch. V, § 35, 1 Stat. 29, 46–47 (1789). The following year, the Crimes Act of 1790 continued along this reformist path. Of the 22 new federal offenses created, many of them felonies, only six required a determinate sentence of hanging. *See* An Act for the Punishment of Certain

Crimes Against the United States, ch. IX, 1 Stat. 112 (Crimes Act of 1790). These early laws provided a template that, for the most part, continues to shape modern statutes. *Compare* Crimes Act of 1790, § 18, 1 Stat. at 116 (providing that every person guilty of perjury "shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars"), *with* 18 U.S.C. § 1621 (providing that every person guilty of perjury "shall . . . be fined under this title or imprisoned not more than five years, or both").

Early Congresses did, on occasion, establish statutory minimums as well as maximums. For example, a 1798 statute concerning fraud against the Bank of the United States required that the offender "be imprisoned and kept at hard labour for a period not less than three years, nor more than ten years." An Act to Punish Frauds Committed on the Bank of the United States, ch. LXI, 1 Stat. 573, 573–74 (1798); *see also* An Act for the Punishment of Certain Crimes Against the United States, ch. LXXIV, § 1, 1 Stat. 596, 596 (1798) (providing for imprisonment from six months to five years for conspiracy to commit sedition). But within these broad statutory ranges, the judge remained free to assign the sentence he believed was just. *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9–10 (1998).

2. Beyond the discretion to determine the term of a particular sentence, judges have traditionally been responsible for deciding whether sentences run concurrently or consecutively when a defendant is convicted of multiple offenses or is serving a prior sentence at the time of his conviction for a subsequent offense. *Setser* v. *United States*, 566 U.S. —, 132 S. Ct. 1463, 1468 (2012). In this respect, American law drew on established English precedent rather than departing from it. In 1769,

the House of Lords explained that a judge's exercise of discretion to assign a "cumulative" (*i.e.*, consecutive) punishment was nothing more than "shaping the judgment to the peculiar circumstances of the case." *R* v. *Wilkes*, 19 How. St. Tr. 1075, 1134 (H.L. 1770). In sentencing the defendant, who had been convicted of two offenses and sentenced to consecutive terms of 10 months and 12 months, respectively, the Lords explained that the judge was "providing . . . the punishment the Court thought his crime deserved." *Ibid.*; *see also* 1 Joseph Chitty, *A Practical Treatise on The Criminal Law* *718 (courts may provide for consecutive sentences "in their discretion").

The Virginia Supreme Court recognized this principle as early as 1806. *See Commonwealth* v. *Leath*, 3 Va. 151, 154–55 (1806) (holding that defendants "may be adjudged" to imprisonment whereby each term "commence[s] from and after the expiration" of the previous terms). The Connecticut Supreme Court reached the same result five years later, confirming what had been "the usage of our courts, for many years past, in this state." *Connecticut* v. *Smith*, 5 Day 175, 179 (1811). As the court explained, "if, for the advancement of justice, or through the exercise of mercy, the punishment may be delayed, a day, or a month, upon the same principle, it may be, for sufficient cause, postponed for one or more years [to accommodate a prior sentence for another conviction], according to the discretion of the court." *Ibid.* By the end of the 19th century, "there [was] no question of the power of the court to impose cumulative sentences for separate offenses, according to the very decided weight of authority at the common law." *Howard* v. *United States*, 75 F. 986, 991 (6th Cir. 1896) (citing *Wilkes*, *supra*). That discretion was ultimately codified in federal law at 18 U.S.C. § 3584. *See Setser*, 132 S. Ct. at 1469.

3. Finally, in order to effectuate the informed exercise of a judge's discretion to set the term and structure of a defendant's sentence, courts have long been afforded discretion to consider any information relevant to determining a just sentence. "'[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.'" *Pepper*, 562 U.S. at 488 (quoting *Williams* v. *New York*, 337 U.S. 241, 246 (1949)); *see, e.g.*, *State* v. *Smith*, 2 Bay 62, 62–63 (S.C. Const. App. 1796) ("[A]ll [] extenuating circumstances should be submitted to the court . . . ."); *People* v. *Vermilyea*, 7 Cow. 108, 109 (N.Y. Sup. Ct. 1827) ("[T]he circumstances in evidence must be laid before [judges] . . . to enable them to estimate the measure of punishment.").

Thus, for example, in the 1798 trial of Congressman Matthew Lyon, Justice Paterson, riding circuit in Vermont, sentenced Lyon only after taking account of both the Congressman's status as an elected official (an aggravating circumstance) and his recent financial troubles (a mitigating circumstance). As Justice Paterson explained to Lyon in imposing his sentence:

> Your position, so far from making the case one which might slip with a nominal fine through the hands of the court, would make impunity conspicuous should such a fine alone be imposed. What, however, has tended to mitigate the sentence which would otherwise have been imposed, is, what I am sorry to hear of, the reduced condition of your estate.

Case of Lyon, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798). Lyon was sentenced to four months in prison and a $1,000 fine (well below the statutory maximums of two years and $2,000, respectively). *Ibid.*

Ultimately, a judge's discretionary consideration of "the fullest information possible concerning the defendant's life and characteristics" came to define the American approach to sentencing: namely, that "the punishment should fit the offender and not merely the crime." *Williams*, 337 U.S. at 247; *see also Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."); *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (plurality op.) ("[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account." (citations omitted)).

B. Congress Has Expressly Affirmed Judges' Discretion To Consider the Fullest Information Possible

The path of judicial discretion from the founding to the present has not been uncomplicated or uncontroversial. Most significantly, the Sentencing Reform Act of 1984 (SRA), 98 Stat. 1987, "made far-reaching changes in federal sentencing." *Koon*, 518 U.S. at 92. The SRA responded to certain perceived ills that its drafters believed resulted from unconstrained judicial discretion. *Mistretta* v. *United States*, 488 U.S. 361, 363–66 (1989); *see also* Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) <http://

tinyurl.com/KennedyABA>; Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 Judicature 208 (1976); Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972).

It is significant, however, which aspects of judicial discretion Congress limited—and which it did not. The Sentencing Guidelines (at least while they were mandatory) and congressional enactments increasing the number of mandatory minimum sentences narrowed the boundaries within which district courts can determine the term of imprisonment. *See, e.g.*, Families Against Mandatory Minimums, *Mandatory Minimum Sentences Created, Increased, or Expanded by Congress, 1987–2012* <http://tinyurl.com/MM1987-2012>. And Congress's dictate that certain crimes, such as § 924(c), carry mandatory minimum sentences that may not run concurrently with any other curtailed the judiciary's discretion to structure certain sentences in light of individual circumstances.

But Congress has not curtailed judicial discretion to consider the widest range of information in reaching a just sentence—whether in the SRA or otherwise. On the contrary, Congress has repeatedly "[a]cknowledg[ed] the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances." *Koon*, 518 U.S. at 92. In 1970, "Congress . . . affirmed this fundamental sentencing principle" by enacting 18 U.S.C. § 3577 (1970). *United States* v. *Grayson*, 438 U.S. 41, 50 (1978). That provision stated:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The same language was incorporated that year into the Controlled Substances Act, subject only to any exceptions that might be authorized in the same subchapter. *See* 21 U.S.C. § 850.

Notwithstanding the fundamental changes the SRA worked to other aspects of judicial discretion, it left § 3557 untouched, recodifying it as § 3661. In addition, the Sentencing Commission expressly incorporated the new § 3661 in the Guidelines, where it remains today:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

U.S.S.G. § 1B1.4 (emphasis added); *see also* Fed. R. Evid. 1101(d)(3) (sentencing not governed by rules of evidence, other than privileges). "Both Congress and the Sentencing Commission thus expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" *Pepper*, 562 U.S. at 489 (alteration in original) (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)).[3]

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[3] "Of course, sentencing courts' discretion under § 3661 is subject to constitutional constraints." *Pepper*, 562 U.S. at 489 n.8. For example, as a matter of due process, information used at sentencing must be reliable. *See Townsend* v. *Burke*, 334 U.S. 736, 740–41 (1948).

As a result of both judicial tradition and congressional affirmance of that tradition, judges have always been entrusted with the power and duty to base their sentencing decisions on the fullest information possible concerning the cases and offenders before them. *See Koon*, 518 U.S. at 113. And despite shifts in sentencing practices, the preservation of a judge's discretion to consider the whole person, and all the attending circumstances, has reflected "a recognition of and respect for the individuals caught in the interstices of the general standards—the individual who could well be helped, or even changed if only we paid attention, the individual who surely does not deserve cookie-cutter justice." Nancy Gertner, Remarks at the American Bar Association Justice Kennedy Commission 11 (Nov. 12, 2003) <http://tinyurl.com/GertnerABA>. As Justice Kennedy has explained, "the prisoner is a person; still, he or she is part of the family of humankind." Kennedy, *supra*, at 2. A judge's discretion to consider all information relevant to a sentence protects the dignity of each individual defendant.

II. ABROGATING JUDICIAL DISCRETION IN THE SENTENCING CONTEXT REQUIRES A CLEAR STATEMENT OF CONGRESSIONAL INTENT

A. In light of the unique role judicial discretion has occupied in the federal sentencing tradition, this Court has repeatedly rejected attempts to curb a district court's discretion in the face of equivocal statutory language. As a result, if Congress intends to depart from longstanding practice by limiting a district court's discretion, it must say so in clear terms.

In *Dorszynski* v. *United States*, 418 U.S. 424 (1974), this Court held that, where a proffered interpretation will have the effect of "limiting the sentencing court's discretion," courts "will not assume Congress to have intended

such a departure from well-established doctrine without a clear expression to disavow it." *Id.* at 441. *Dorszynski* concerned a provision of the Federal Youth Corrections Act (since repealed by the SRA) providing that "[i]f the court shall find that the youth offender will not derive benefit" from the Act's provisions, "then the court may sentence the youth offender under any other applicable penalty provision." *Id.* at 436. The defendant urged an interpretation that would require the district court to provide a statement of reasons regarding the lack of any "benefit" before the court could sentence a youth offender outside the Act's provisions. This Court observed that the provision of a statement of reasons served "to facilitate appellate supervision of, and thus to limit, the trial court's sentencing discretion." *Id.* at 441–42. Because that limitation was "at odds with traditional sentencing doctrine," this Court rejected it in the absence of a clear statement to the contrary. *Id.* at 440.

Relatedly, the Court has stated that, because sentencing is "a matter of discretion traditionally committed to the Judiciary," a statute purporting to regulate a district court's discretion must be interpreted "in light of 'the common-law background against which the statute[] . . . [was] enacted.'" *Setser*, 132 S. Ct. at 1468 (ellipsis in original) (citation omitted). The issue in *Setser* was whether a district court had discretion to determine whether a federal sentence would run consecutively to a state sentence that had not yet been imposed. Section 3584 provides courts with the discretion to impose consecutive sentences when multiple sentences "are imposed . . . at the same time" and when the defendant "is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a). By its plain terms, the provision does not address a district court's authority with respect to a

future sentence. This Court rejected the defendant's contention that Congress's failure to provide for discretionary authority with respect to future sentences meant that discretion was absent. The common law recognized such authority, *see* 132 S. Ct. at 1468 (collecting cases), and there was no language in § 3584 or any other statute "to show that Congress foreclosed the exercise of district courts' sentencing discretion in these circumstances," *ibid.* Thus, the district court retained its common law authority to impose a consecutive sentence.

Finally, the Court has said that it will "decline[] to read any implicit directive into [] congressional silence" in the sentencing context. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). In *Kimbrough*, this Court confronted statutory provisions with minimum and maximum imprisonment terms for crack and powder cocaine and their interaction with the Guidelines. Although the relevant statute mentioned explicit weights only in relation to triggers for the statutory mandatory minimums, the Government argued that the statute "'implicitly'" addressed other amounts as well. *Id.* at 102 (brackets omitted). This reading encountered a "formidable obstacle" because it "lack[ed] grounding in the text" of the statute. *Ibid.* Favoring a "cautious reading," the Court refused to read in such meaning, stating that "[d]rawing meaning from silence is particularly inappropriate [in the sentencing context, because] Congress has shown that it knows how to direct sentencing practices in express terms." *Id.* at 103.

B. Congress itself codified a strong clear-statement principle in the SRA. Section 3551(a) provides:

> Except as otherwise *specifically provided*, a defendant who has been found guilty of an offense described

> in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

18 U.S.C. § 3551(a) (emphasis added). The most important directive of that chapter is the "overarching provision," *Kimbrough*, 552 U.S. at 101, articulated in § 3553(a) and commonly known as the "principle of parsimony," requiring the sentencing judge to impose, in each case, a sentence that is "sufficient, but not greater than necessary" to achieve the many purposes of punishment in the criminal justice system. 18 U.S.C. § 3553(a). In addition, § 3553(a) enumerates the familiar factors that a district court *must* consider in selecting that parsimonious sentence, including the history and characteristics of the defendant, § (a)(1), the need to protect the public from further crimes of the defendant, § (a)(2)(C), and "the kinds of sentences available," § (a)(3).[4] The Government has elsewhere conceded that consideration of a defendant's "other sentences" falls within the ambit of "§ 3553(a)'s broad categories of consideration." Brief for the United States 29, *United States* v. *Smith*, No. 13-1112 (10th Cir. Sept. 3, 2013); *see also Smith*, 756 F.3d at 1183–84, 1192 (noting concession); *United States* v. *Vidal-Reyes*, 562 F.3d 43, 49 n.4 (1st Cir. 2009) ("The effect of a mandatory consecutive sentence certainly bears upon the

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[4] Section 3553(a)(3) mandates attention in each case to the full range of sentencing options, including such issues as whether probation is available, the governing maximums, whether any minimum applies, whether restitution is mandatory, and whether there is any limitation on concurrency. *See* S. Rep. 98-225, 98th Cong., 1st Sess. 77 (1983).

§ 3553(a) factors to a certain extent."). Thus, unless "specifically provided" by another statute, a sentencing judge may appropriately consider the sentence imposed on another count of conviction as part of the mandatory factors enumerated in § 3553(a), and a judge must consider that sentence if failure to do so would result in a sentence that is "greater than necessary."

Congress's use of the word "specifically" in § 3551(a) is significant—and distinguishes it, even among provisions of the SRA. *See, e.g.*, 18 U.S.C. § 3583(b) (providing terms of supervised release "[e]xcept as otherwise provided"). At the time the SRA was enacted, dictionaries uniformly defined the word to mean "explicitly, particularly, definitely," *Black's Law Dictionary* 1254 (5th ed. 1979) and "free from ambiguity," *Webster's Ninth New Collegiate Dictionary* 1132 (1983). *See also American Heritage Dictionary* 1240 (1981) ("Explicitly set forth; particular; definite"); *Random House Dictionary of the English Language* 1366 (1981) ("explicit" and "definite"). It is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted); *accord Ratzlaf* v. *United States*, 510 U.S. 135, 140–41 (1994). Fidelity to that principle demands more than arguments resting on implication and inference if judges are to depart from the ordinary operation of § 3551. As Congress itself has instructed, any exception to § 3551 requires an unambiguous expression of legislative intent.

III. SECTION 924(c) DOES NOT ABROGATE A DISTRICT COURT'S DISCRETION TO CONSIDER THE LENGTH OF THE § 924(c) MANDATORY MINIMUM IN IMPOSING A SENTENCE ON THE UNDERLYING OFFENSE

Particularly when viewed in light of the requirement that Congress clearly evince its intent to abrogate a judge's discretion in the sentencing context, the plain text of § 924(c) does not support the Government's position.

A. Section 924(c) Does Not Clearly Evince Congressional Intent To Abrogate Judicial Discretion To Consider the Mandatory Minimum Sentence

In determining whether § 924(c) requires a district judge to blind herself to the fact of a defendant's § 924(c) mandatory minimum, this Court should begin "'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" *Puerto Rico* v. *Franklin California Tax-Free Trust*, 579 U.S. —, 136 S. Ct. 1938, 1946 (2016) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)).

1. As relevant here, § 924(c) provides that any person who violates its substantive prohibition "shall, in addition to the punishment provided for [the underlying offense]" be sentenced to a mandatory minimum term of imprisonment. 18 U.S.C. § 924(c)(1)(A)(i). Next, it provides that, "[n]otwithstanding any other provision of law," no term of imprisonment imposed with respect to § 924(c) "shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed [for the predicate offense]." § 924(c)(1)(D)(ii).

Section 924(c) thus says two things—and *only* two things—about the district judge's discretion. *First*, the

judge must impose a minimum sentence on the § 924(c) count, regardless of whatever term she may think is appropriate—thus limiting the first aspect of judicial discretion discussed above. *Second*, that mandatory term must be "in addition to the punishment provided" for the underlying offense, which is to say, the mandatory term may not "run concurrently with . . . any term of imprisonment" for the underlying offense—thus limiting the second aspect of judicial discretion discussed here. But § 924(c) goes no further.

Section 924(c) does not say what term of imprisonment must be "provided" for the underlying offense. On the contrary, by using the term "any," the statute reflects Congress's understanding that there might not be any term of imprisonment at all for the underlying offense. This interpretation is reinforced by the fact that § 924(c) does not require that the sentence imposed run "consecutively," only that it *not be concurrent*, thus permitting, for example, a sentence of only a fine on the other count. *See* 18 U.S.C. §§ 3551(b), 3571(a). Nor does the statute say anything (beyond barring concurrent sentences) about how the district court should exercise its discretion with respect to imposing a sentence on the underlying offense, such as what information the district court should or should not consider or whether the term for the underlying sentence term may be concurrent to some third sentence. The absence of any mention of that sentence points toward the conclusion that some *other* source of law will "provide[]" the sentence for the underlying offense. *See Smith*, 756 F.3d at 1185.

But while § 924(c) is effectively silent as to the underlying offense, § 3551 is not. It provides that, in the absence of another provision that "*specifically* provide[s]" for a departure from its ordinary operation, the provisions

of Chapter 227 of Title 18 govern. *See United States* v. *Franklin*, 499 F.3d 578, 588 n.1 (6th Cir. 2007) (Moore, J., concurring). Those provisions, most notably § 3553(a)(3), *require* the sentencing judge to consider the effect of the mandatory sentence in imposing a sentence on the underlying offense if failing to do so would yield a punishment that is "greater than necessary" to achieve the purposes set forth in 18 U.S.C. § 3553(a)(2).

This interpretation in no way dilutes the punitive impact of § 924(c). On the contrary, the provision retains considerable force by "guarantee[ing] that—whatever the defendant's sentence for his underlying offense—he will *at least* and *always* serve a certain number of years for his gun crime." *Smith*, 756 F.3d at 1185. That is, § 924(c) limits the district court's discretion in two significant ways: Like all mandatory minimums, it ensures the defendant is sentenced to at least a legislatively specified term of imprisonment regardless of whatever the judge may think appropriate. In this case, for example, the district judge believed that a 30-year sentence was "more than sufficient," J.A. 26, but § 924(c) obligated him to impose that sentence on petitioner anyway. Section 924(c) also overrides the court's discretion to structure the sentence as it sees fit by denying the possibility of the mandatory term running concurrently with any other term.

2. The Government contends that "[n]othing in Section 924(c) . . . supports" petitioner's construction. Br. in Opp. 12. That view of sentencing law is exactly backwards. The question is not whether § 924(c) affirmatively reiterates a district court's existing discretion to take account of the fullest information possible about the defendant, including the existence of a mandatory consecutive term that renders further incarceration

unnecessary. The relevant questions instead are whether § 924(c) represents "a clear expression to disavow," *Dorszynski*, 418 U.S. at 441, "a matter of discretion traditionally committed to the Judiciary," *Setser*, 132 S. Ct. at 1468, as codified in § 3661, and whether § 924(c) is so explicit, definite, and unambiguous that it can fairly be characterized as "specifically providing" for a departure from the ordinary operation of § 3551 for sentencing as to the underlying offense.

Instead of pointing to unequivocal language in support of *its* favored construction, the Government asks this Court to "read an[] implicit directive" into § 924(c), *Kimbrough*, 552 U.S. at 103, that is simply not there. This Court has rejected such arguments before. *See, e.g.*, *Pepper*, 562 U.S. at 491 ("We have recognized that 'the broad language of § 3661' does not provide 'any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.'" (quoting *United States* v. *Watts*, 519 U.S. 148, 152 (1997) (per curiam))); *Kimbrough*, 552 U.S. at 103 ("Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms."). It should do so here again.

Indeed, one need not search far to find "*exactly* the language the [G]overnment wants to read into § 924(c)." *Smith*, 756 F.3d at 1186. Just as § 924(c) criminalizes the use of firearms "during and in relation to" certain crimes of violence, 18 U.S.C. § 1028A criminalizes identity theft "during and in relation to" certain enumerated felonies. And like § 924(c)(1)(A), § 1028A(a) provides that its sentence is "in addition to the punishment provided for" the underlying offense. Furthermore, § 1028A(b)(2) matches § 924(c)(1)(D)(ii) in prohibiting the imposition of a sentence that is concurrent to any sentence on the underlying

offense.[5] But then § 1028A sets off on a distinct path by providing that

> in determining any term of imprisonment to be imposed for the [underlying offense], a court *shall not in any way* reduce the term to be imposed for [the underlying offense] so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section[.]

§ 1028A(b)(3) (emphasis added). This language—entirely missing from § 924(c)—curtails the scope of information available to the sentencing judge in deciding the term of imprisonment on the underlying offense. It is the kind of "clear expression," *Dorszynski*, 418 U.S. at 441, that "Congress [knows] how to [provide] . . . in express terms," *Kimbrough*, 552 U.S. at 103. And it is the kind of language that § 924(c) would require if the Government's interpretation were to be sustained.

B. Any Ambiguity in § 924(c) Must be Resolved in Favor of the Defendant

If recourse to traditional tools of statutory construction leaves any doubt about the effect of § 924(c), this Court should invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates* v. *United States*, 574 U.S. —, 135 S. Ct. 1074, 1088 (2015) (plurality op.) (internal quotation marks omitted). In the sentencing context, that requires

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[5] On the other hand, § 1028A does not emulate one significant feature of § 924(c): Section 1028A does not require that multiple mandatory minimum sentences for aggravated identify theft run consecutively to one another. *See* 18 U.S.C. § 1028A(b)(4) (preserving judicial discretion with respect to concurrency).

"choos[ing] the construction yielding the shorter sentence," *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality op.), in light of the "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," in *Benchmarks* 196, 209 (1967).

1. The history of the rule of lenity supports its application in this context because the rule has its origins in the narrow construction of statutes providing for mandatory sentences. Faced with statutes that provided for mandatory death penalties for minor offenses, English courts began invoking a principle that "penal statutes must be construed strictly." 1 William Blackstone, *Commentaries* *88. Blackstone provides the example of a statute that took away the "benefit of the clergy"[6] if a defendant had been convicted of stealing "*horses*," but "the judges conceived that this did not extend to [to a defendant] that should steal but *one horse*." *Ibid.*; *see also R* v. *Cook*, 1 Leach 105 (K.B. 1774) (theft of a "heifer," though "clearly proved," could not be punished under a statute forbidding theft of a "cow"). Although traditionally framed as a rule governing the interpretation of substantive criminal prohibitions, the rule of lenity's roots lie in judicial attempts to delineate carefully the scope of offenses subject to harsh mandatory penalties.

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[6] "Benefit of the clergy" was a jurisdictional mechanism by which ordained clergy could transfer criminal cases brought against them out of the royal courts and into the ecclesiastical courts. Eventually, the "benefit" would be expanded to almost any male defendant who could read. *See generally* 4 Blackstone *365–74; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 37–41 (1983).

Once brought to America's shores, the rule of lenity was unmoored from its origins in the sentencing context. Instead, it was justified primarily on concerns regarding the principle of legality, which holds that punishment must be imposed only pursuant to law, and on separation-of-powers principles. Thus, Chief Justice Marshall explained that the rule of lenity "is founded [both] on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820). A century later, Justice Holmes echoed the same point in explaining that the rule serves to ensure that courts do not punish "because it may seem to [them] that a similar policy applies" to acts not expressly covered by a statute, "or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). As Justice Scalia explained more recently, the judiciary has attempted to vindicate these fundamental principles through a practical rule that "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality op.).

Modern cases have thus categorized the rule of lenity as akin to a clear statement rule. For example, the Court has said that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [the judiciary] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952). Similarly, in *Bell* v. *United States*, 349 U.S. 81 (1955), the Court explained that the rule of lenity applies

when "Congress leaves to the Judiciary the task of imputing to Congress an undeclared will." *Id.* at 83–84. If, after consulting the traditional tools of statutory construction, "a reasonable doubt persists about a statute's intended scope," then the rule must be applied to resolve that doubt in favor of the defendant. *R.L.C.*, 503 U.S. at 305–06 (plurality op.) (internal quotation marks omitted).[7]

2. The rule of lenity confirms that the Government's interpretation of § 924(c) should be rejected. At best, the Government's argument rests on vague assertions of statutory purpose—"a sort of rule-of-severity interpretive canon." *Smith*, 756 F.3d. at 1191; *see* Br. in Opp. 12. "The best evidence of [legislative] purpose," however, "is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Even in cases

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[7] Some of this Court's cases embrace a different articulation of the rule of lenity. For example, *Muscarello* v. *United States*, 524 U.S. 125 (1998), includes language suggesting that only a "'grievous ambiguity or uncertainty'" will trigger the rule of lenity. *Id.* at 138–39 (quoting *Staples* v. *United States*, 511 U.S. 600, 619, n.17 (1994), and *Chapman* v. *United States*, 500 U.S. 453, 463 (1991)) ; *see also Shaw v. United States*, 580 U.S. —, — (Dec. 12, 2016) (slip op. at 8); *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974). These cases should not be read to depart from the traditional standard, as they lack any discussion evidencing an intent to modify the centuries-old rule repeatedly recognized by this Court. That line of cases also contains additional language that is more consistent with the clear-statement requirement of the rule as properly understood. *See, e.g.*, *Muscarello*, 524 U.S. at 139 (reasoning that the conduct at issue fell within the "'generally accepted contemporary meaning'" of the statutory language); *Chapman*, 500 U.S. at 463–64 (quoting formulation that lenity applies in cases of "reasonable doubt"). The application of the rule in the recent *Yates* decision reiterated the long-recognized "clear and definite" standard. *See* 135 S. Ct. at 1088 (quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 222).

where the statutory text is ambiguous, the rule of lenity requires construing the statute against the Government, notwithstanding the purported purpose of the statute. Indeed, this Court has already rejected essentially the same purpose-based argument as applied to this very statute. *See Busic* v. *United States*, 446 U.S. 398, 408–09 (1980) (refusing to interpret § 924(c) based on the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible," and applying the rule of lenity). The Court should do so again.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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